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# **THE FREEDOM OF THE SEAS**





Univ. of  
California

# THE FREEDOM OF THE SEAS

BY  
LOUISE FARGO BROWN  
"



NEW YORK  
E. P. DUTTON & COMPANY  
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TO THE  
AIRBORNE

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B7

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TO  
**My Father**

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## PREFACE

**O**NE way of attacking the vexed problem of what is meant by Freedom of the Seas is to attempt to discover what the phrase has meant in the past. Since it has again and again been used as a war cry, light on the former connotations of the expression may mean light on its significance to-day and to-morrow. Therefore the main phases of an ancient controversy are outlined in these pages in the hope that the recital may at least stimulate thought at the present time.

The study makes no pretense of being an exhaustive presentation of the subject. The author hopes to publish later in a more extended and fully-documented form the results of research on the different aspects of freedom of the seas since 1713; she wishes to express her great indebtedness for

suggestions as to the earlier period to Dr. Frances G. Davenport, who has in preparation a study of the subject covering those years. Thanks are also due to Dr. Davenport, as well as to the editor of the *Unpopular Review*, for permission to incorporate passages from an article of joint authorship which appeared in that periodical. The author wishes to give public expression to her gratitude to Miss Lucy M. Salmon for much helpful advice and encouragement. The study has been made possible by the generosity of the founders of the Alice Freeman Palmer fellowship given by the Association of Collegiate Alumnæ.

L. F. B.

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# **THE FREEDOM OF THE SEAS**





# **I**

## **SOVEREIGNTY OF THE SEAS**

**" Here begin the good customs of the Sea."**

*Consolato del Mare.*

**" The use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof."**

*Queen Elisabeth.*



I

SOVEREIGNTY OF THE SEAS

**I** AM indeed Lord of the world, but the law is lord of the sea." These words of the elder Antonine, and the statement of the Roman law that the sea by the law of nature is common to all, formed the bases for the learned treatises of the seventeenth and eighteenth centuries on the Freedom of the Seas. Reinforced by elaborate citations from classical poets and Hebrew prophets, and bulwarked by reams of argumentation about the law of nature and the law of man, they presented a formidable structure. The comment of the modern reader is that these authors protested too much, for what more obvious than

#### 4 THE FREEDOM OF THE SEAS

the truths thus elaborated; that the sea, being the common highway, ought to be open to all mankind, and that, in order that the rights of none be obstructed, there must be rules of the road. Yet for centuries men have been laboring, on the one hand to establish sea freedom, on the other to frame such a law of the sea as shall maintain its freedom at all times. What progress have those centuries seen?

The law of the sea to which Antonine referred was the Rhodian law; in the course of the Middle Ages other codes developed, of which the most important were the laws of Oleron and the *Consolato del Mare*. But while the recognition of common rights under a law of the sea was kept alive, men came to feel that continual usage established rights over particular portions of the sea. Thus Venice claimed the Adriatic, Genoa the Ligurian Sea, and the British kings the four seas which bathed their island dominions. Indeed, the estab-

lishment of the British Admiralty court, to administer the law in maritime affairs, was closely connected with the idea of the sovereignty of the British seas; the king's peace must be kept upon the king's seas. And it will greatly help toward the understanding of one of the most difficult aspects of the problem of freedom of the seas to-day if the fact is kept in mind that this feeling of responsibility for administering the law of the sea without favor has been a tradition with Englishmen for six centuries at least. With the development of British sea power the field of responsibility for policing the seas was extended until it comprehended all the waters of the globe. The tradition of wardenship of the seas underlies British pre-occupation with the problems of communications and defense, and is a strong element in British feeling that discussion of freedom of the seas to-day is either academic or Teutonic.

Yet enlightenment on this point lies in

## 6 THE FREEDOM OF THE SEAS

the old sea codes themselves, in so far as they deal with international relations. Piracy, letters of marque and reprisal, disposition of the crews of captured vessels, distribution of prizes, the status of the goods of an enemy on the ship of a friend, and the goods of a friend on the ship of an enemy: these were sources of bitterness in the fourteenth century; they were still so in the nineteenth, and some of the bitterness is with us to-day. France and England were quarreling over a question of prize jurisdiction in 1805; the matter was submitted to arbitration and war broke out before a settlement had been reached. In 1907, it was decided that dissatisfaction over the decisions of national prize courts should be ended by the establishment of an international prize court. The court never sat, because no agreement could be reached as to what was the law of the sea, and before any settlement was found the present war broke out.

The struggle over sea sovereignty began later than the controversy over sea law. It dates from the age of discovery. In 1455 Pope Nicholas V rewarded the pertinacity of the Portuguese in exploring the African coast by granting to the crown of Portugal exclusive rights of navigation, trading and fishing in the waters beyond Capes Boyador and Non. The claims of Portugal in those regions were contested by Spain, but Nicholas' successor confirmed the grant, defining it as reaching "all the way to the Indians," a phrase upon which Portugal later based her claim to exclusive rights in the Indian ocean. When Columbus, returning from his first voyage, stopped in Portugal, the king stated that his discovery apparently lay in Portuguese seas. Accordingly Ferdinand and Isabella appealed to the Pope of the hour, who was a Spaniard, and Alexander VI obligingly issued a series of bulls which secured to them in western waters rights similar to those al-



## 8 THE FREEDOM OF THE SEAS

ready granted to Portugal in the south and east. The demarcation line fixed by the Pope gave rise to controversy, but the two nations finally agreed that it should be located 370 leagues west of the Cape Verde Islands, and that it should be regarded as extending around the globe.

It was understood that when the Spaniards sailed through Portuguese waters to reach their own they must take the most direct route. Men of any nation who braved the terrors of excommunication and were found in forbidden waters were to be seized and treated as "corsairs and violators of the peace." What this was likely to mean can be judged by the command of the Portuguese king in the days of his controversy with Spain, that offending vessels were to be seized and their crews thrown into the sea: "in order," said the monarch, with a humanitarianism unknown to the *Consolato del mare*, "in order that they may die a natural death."

In 1544, nearly a century after the initiation of the policy of papal partition, John III of Portugal, writing to the Spanish ruler, the Emperor Charles V, stated that the European nations had not objected to the division of the seas between the two countries, and that, with the exception of "certain French corsairs," whose actions their sovereign had disavowed, they had kept away from those seas. The exception, however, was an important one, for although Francis I, the sovereign in question, disavowed the alleged trespasses when he found it more convenient to do so, on other occasions he sustained them, and won for himself the reputation of being the first sovereign of modern times to champion the freedom of the seas. To the expostulations of the king of Portugal he maintained: "The act of traffic and exchange of goods is of all rights one of the most natural and best grounded." To the remonstrances of Charles V he responded, "Is sending my

## 10 THE FREEDOM OF THE SEAS

ships yonder a declaration of war and a breach of friendship with his Majesty? The sun shines for me as well as for others. I should like to see the clause of Adam's will which excludes me from the partition of the world!"

The deeds thus defended dated back to the early days of the monopoly, for French corsairs were lying in wait for Columbus on his return from his third voyage. Before 1515, Frenchmen were trading with Brazil, and French fishermen frequented the banks of Newfoundland still earlier. Jean Ango, a wealthy armateur of Dieppe, sank his enormous fortune in fitting out vessels which maintained the principle of freedom of the seas by voyages of discovery, punctuated by captures of the rich cargoes of spices and wares of the Orient brought from the Indies by the Portuguese, and vessels laden with precious metals brought from the new world by the Spaniards. The brothers Parmentier, Crignon, Jean

Fain, Verrazano, were among Ango's captains, and their exploits make a thrilling tale. As for their status, it varied. In time of war, general letters of reprisal made them free of the enemy's property on the sea. In time of peace, general letters of reprisal were sometimes issued on account of specific injury, as when Francis I proclaimed them because his mariners had been interfered with while seeking their livelihood on the paths of the sea which were common to all. In times of peace, the genial custom prevailed of issuing special letters of reprisal, which permitted the recovery of the value of stolen goods from any compatriot of the thief unfortunate enough to cross the path of the aggrieved person. In the thought of Ango's men, when they took a Spanish or Portuguese prize, whether they had letters or not the act was just reprisal, inasmuch as their comrades, taken in forbidden waters, had been treated as pirates: in the thought

## 12 THE FREEDOM OF THE SEAS

of the victims, these acts were piracy pure and simple.

It is a well-known fact that Francis I was capable of forgetting his principles, on occasion, in view of advantages political or other. In 1581, he upheld the order of his admiral, a man of Portuguese affiliations, not to sail toward the Portuguese colonies, but two years later he issued letters of marque reaffirming freedom for all to sail the common sea. Portuguese ports were convenient points of vantage from which corsairs could swoop down upon Spanish ships returning from the West Indies, and to which they could return in triumph, bringing their prizes with them. In 1586, Francis I secured from Portugal permission to use her ports in that way, and, in acknowledgment, he later ordered his ships to keep away from the regions claimed by Portugal. This was annoying, especially to the Frenchmen who were growing rich in the Brazil trade, and the orders, which were

twice repeated in successive years, were apparently honored chiefly in the breach. When Francis' shifting policy led him in 1545 to forbid Frenchmen to sail to the possessions of Spain in the Indies, the order was no better obeyed, and Spain and Portugal were finally forced into arrangements for a joint police of the seas. Francis' successor agreed that for five years his subjects were not without special license from Spain to sail or trade in the Indies, but the difficulties of enforcing such pledges proved insurmountable, and in 1559 a verbal agreement was made that beyond the lines of amity might would make right and treaties have no force. As the lines of amity were the prime meridian and the Tropic of Cancer, the region given over to the law of the stronger was an extensive one. The policy thus inaugurated long remained a rule of the sea; Spaniards and Portuguese treating as pirates all foreigners found beyond the Line, and French authorities rul-

## 14 THE FREEDOM OF THE SEAS

ing that Spanish and Portuguese vessels might be seized beyond the Line until the rulers in question should admit the right of the French to trade freely in Indian and American seas.

With the spread of Calvinism, the struggle against the Peninsular monopoly took on somewhat of the aspect of a religious conflict, but with the development of the Wars of Religion the attention of the French mariners was turned toward operations against their countrymen. But the mariners of England took their place. The motivation of the deeds of French corsairs was simple: they were seeking wealth, by trade if possible, by the simpler method of seizure when opportunity could be found. The motivation of the famous achievements of the Elizabethan sea dogs was the same; in addition they had the comforting conviction, as had the Huguenots, that deeds done against papists were services to the cause of righteousness. It is not necessary,

to review here the tremendous exploits of the Elizabethans, who penetrated all the seas of the world and laid the foundations of England's maritime greatness, and upon whose deeds, both sordid and splendid, Romance has set her seal. Elizabeth's dictum that the sea and the air were common to all was as emphatic as that of Francis I, and it was more consistently maintained. She did, indeed, in 1561 command her subjects to avoid Portuguese waters, but she made no effort to enforce the order, and she exercised the prerogative of disavowing the acts of her subjects when she chose, while never failing to exact the royal share of their spoil. The victories of Drake in the Caribbean in 1586 meant the death blow of Spain's hopes of barring effectually the western seas. They did not, however, affect Spain's acknowledged right to maintain the monopoly of trade with her colonies, nor did they cause her to yield one jot of her claim of the right to monopolize



## 16 THE FREEDOM OF THE SEAS

the navigation of colonial waters. France and England endeavored to obtain trade concessions by treaty, but sedulously avoided committing themselves to any agreement that might seem to acknowledge that Spain had any right to prevent the vessels of other nations from sailing the American seas.

While England was contesting Spain's monopoly in western waters a new maritime power, the United Netherlands, was breaking down that of Portugal in the east. The ships of the Dutch East India Company won their way against the Portuguese, and made prize of their vessels, and in order to set at rest the scruples of stockholders who hesitated to pocket profits that had not been won in peaceful trade a Dutch lawyer named Grotius wrote a learned treatise on the law of prize. One chapter was devoted to arguments proving that the Indian Ocean was free to all and that the Portuguese claims there were groundless. When,

in 1608, the Dutch were endeavoring to obtain the right to trade with the overseas dominions of Spain, this chapter was published as a separate work, under the title *Mare Liberum*, to give strength to their plea. Their effective argument was the sea power which they had developed in the years of their contest with Spain. Their illicit traffic with Spanish possessions both in the east and west had assumed tremendous proportions during the years of war, and Dutch merchants in fear of losing these sources of profit dreaded the return of peace. With the powerful backing of England and France, they succeeded in obtaining from Spain in 1609 permission, in veiled terms, to trade in the Indies in places not actually occupied by Spain. The English claimed to have obtained similar rights in the treaty of 1604, but Spain never admitted their interpretation of an obscure article in that document. The concession to the Dutch, however, was made explicit in 1648, and

constituted the first conceded breach in the Spanish colonial monopoly.

Although the *Mare Liberum* cannot be supposed to have influenced the treaty of 1609, it had an unexpected effect in quite another quarter. The claim to sovereignty over the British seas seems to have been in abeyance during the reign of Elizabeth, but the Stuarts' conception of their God-given powers led to an unprecedented extension of that claim. The earlier monarchs had taken seriously the duties their pretensions entailed; it was left for the Stuarts to think of the British Seas as a source of honor and profit. The first Stuart was cannily exercised over the profit; his son, equally characteristically, over the honors. Just how far the British seas extended, even the admirals who were supposed to defend British authority there were never able to get the Crown lawyers to pronounce with any exactitude. Some learned jurists maintained that they stretched to the Brit-

ish possessions in America; others were satisfied with a western boundary line drawn from Cape Finisterre to Norway. Fisheries were valued by rulers in those days partly as "nurseries for seamen," and James I endeavored to force his subjects to eat fish on fast days, not as a religious exercise, but to keep these nurseries thriving. He connected the rising maritime power of the Dutch with their great herring industry in the North Sea, and with his Scotch thrift he was appalled at the thought of an industry plied in British waters swelling the navy as well as the coffers of another nation. Within two months of the publication of the *Mare Liberum*, the Dutch were notified that they were no longer to fish in British Seas without license from the British crown. The disputes that arose over this prohibition were spread over many years, and were embittered by mutual suspicions. The herring fisheries were a means of livelihood for a substantial element of the

Dutch population. On the other hand, the fear of Dutch rivalry had already assumed great proportions in the British mind. Raleigh expressed the current feeling when he declared that the Dutch "hoped to get the whole trade and shipping of Christendom into their own hands, as well for transportation, as otherwise, for the command and mastery of the seas." Moreover, the quarrel spread to other waters. The British claimed the right to bar the Dutch from the whale fisheries in the ocean about Spitzbergen, and for some time two rival companies plied their trade there under the protection of ships of war. Delegation after delegation of diplomats failed to arrange the double controversy, which was embittered by the fact that the Dutch were at the same time driving English traders away from the Spice Islands. The book of Grotius had claimed the seas as a free highway for every nation, and freedom of trade for all nations on every sea, and the

English ambassador at the Hague had sarcastic things to say about a nation that claimed freedom of the seas in one part of the world while denying freedom of trade in another. The English finally won admission to the eastern trade, but the fisheries question remained, in the parlance of the day, a root of bitterness.

Two Englishmen, Welwood and Selden, wrote books to answer the arguments of Grotius as to freedom of the seas. Selden's book, however, remained unpublished until the reign of Charles I, when it was by royal order given to the world to vindicate the claims of that monarch. Not only did he follow his father's policy as to the North Sea fisheries, but he granted exclusive fishing privileges off Newfoundland, forbidding foreigners to fish there without license. His pretensions were expressed for him in sounding phrases by Coke, instructing the British ambassador in 1685:

"We hold it a principle not to be denied, that the

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King of Great Britain is a monarch at land and sea to the full extent of his dominions, and that it concerneth him as much to maintain his sovereignty in all the British seas as within his three kingdoms; because without that these cannot be kept safe, nor he preserve his honour and due respect with other nations. But, commanding the seas, he may cause his neighbours and all countries to stand upon their guard whensoever he thinks fit. And this cannot be doubted, that whosoever will encroach upon him by sea, will do it by land also when they see their time. To such presumption *Mare Liberum* gave the first warningpiece, which must be answered by a defence of *Mare Clausum*, not so much by discourses as by the louder language of a powerful navy."

Recognition of these claims was to be enforced by the salutation of English men-of-war by all foreign vessels they met in the British Seas. This form of recognition seems to have been avoided by captains of independent disposition whenever they believed they could do so with impunity. Danes and Swedes are on record as having refused it, and international incidents arising from the refusal of French captains

occurred until England relinquished her claim in the Napoleonic wars. But Cromwell succeeded, where Charles I with all his ship-money fleets failed, and the Dutch in the height of their power succumbed to "the louder language of a powerful navy." After heroic struggles in the first Dutch war, Holland yielded the point but not the principle. In all her treaties with Great Britain from that time until the Peace of Amiens in 1802, occurred a clause by which the Dutch bound themselves, whenever a Dutch vessel met a vessel of the British navy in British seas, to lower flag and top-sail. However, the Dutch always maintained that it was done as an act of courtesy, not as a recognition of British sovereignty over any part of the sea. Dutch ambassadors emphasized the point by offering to salute in any part of the world.

England was not the only power to claim monopoly in the seas of the north. The Danes claimed the Arctic seas, and pro-



tested against the voyages of British fishermen thither in 1576. Possessing both Norway and Iceland, Denmark claimed the right to control the waters between, and produced in evidence recognition of their claim by English sovereigns. Elizabeth protested vigorously, and British fishermen and traders defended their rights there as in other seas. A claim less difficult of enforcement was Denmark's assumption of the right to sovereignty over the Baltic, since she was in possession of the Straits. The Hanse towns throughout the period of their greatness had endeavored to exclude their trade rivals from the Baltic, and the efforts had led to considerable friction with the English and the Dutch. But the Danish methods were more effective. As early as the fourteenth century Denmark was levying tolls on vessels passing the straits, on the ground that she kept those waters free from pirates, and later that she maintained lighthouses to mark the passage.

The varying amounts of these tolls caused friction from time to time, and during her controversies Denmark claimed "*dominium Baltici*" although whether the term meant the entire Baltic or merely the Straits was not clearly indicated. In 1649 the Dutch, in exchange for the payment of a lump sum, secured free passage for their vessels, and this transaction made these enterprising carriers the chief purveyors of naval stores. This was unsatisfactory to Great Britain, especially when the two powers became rivals, and again it was Cromwell who secured a satisfactory adjustment, although it was not without difficulty. The Dutch persuaded the Danes to co-operate with them in cutting off English trade in the Baltic in 1652, and Cromwell turned to Sweden. When Bulstrode Whitelocke was sent thither in 1653 among the things he was instructed to secure was free navigation through the Sound, not subject to interference from Denmark or the Dutch.

Queen Christina herself paved the way by suggesting that British ships would be useful in freeing the passage of the Sound, but when Whitelocke proceeded to unfold the English proposals she asked shrewdly "why the Baltic sea was named as to free navigation, and not other seas likewise," and asked embarrassing questions as to the probable attitude of Cromwell toward a proposal for free navigation in America. No result came from these negotiations, but the following year Cromwell arranged with Denmark for the opening of the Sound to English vessels, and finally deprived her of her exclusive control by securing in 1658 the cession to Sweden of the lands on the eastern side of the Straits.

Christina's query seems to have been made in the spirit of Grotius' bitter remark made many years before, that "the action of the English is principally directed to the aim of having their commerce into all nations free and to deprive others of theirs."

It will be necessary to estimate the truth of this statement, since it has already become evident that in the sixteenth and seventeenth centuries the struggle for freedom of the seas was essentially a struggle for freedom of commerce.



## II

### TRADE AND THE FLAG

**"Quiconque est maistre de la mer a ung grand pouvoyr sur la terre."**

*Razilly.*

**"That what Nation soever can attaine to and continue the greatest Trade, and number of shipping, will get and keepe the Sovereignty of the Seas, and consequently the greatest Dominion of the World."**

*Henry Robinson.*



## II

### TRADE AND THE FLAG

**S**PAIN'S solicitude in barring trespassers from American waters was not due to devotion to the abstract principle of sovereignty. It was eminently practical. She wished to have no colonies in the new world which did not owe allegiance to her, and she desired to monopolize the trade with her own colonies. The colonial trade was a monopoly of the crown, closely guarded even from Spanish subjects unprovided with a royal license. The other colonizing nations followed Spain in assuming the right to monopolize colonial trade, and in granting such trading privileges as they chose. The right to trade with the



colonies of another nation came to be regarded as a valuable concession, and was seldom yielded unless in a dictated peace, except in exchange for something regarded as equivalent. Elizabeth had contended that existing treaty arrangements permitting trade in the Spanish possessions included the Indies; a claim the Spaniards would not admit. When her successor made peace with Spain in 1604, he endeavored to get an explicit grant of the right to trade at least in those parts of the Indies not actually occupied by Spain, but he was obliged to content himself with a clause yielding such rights as had formerly been granted. This Spaniards and Englishmen interpreted as their predecessors had done.

James' policy of keeping on good terms with Spain prevented friction on this point, but Charles was not satisfied with that policy of establishing colonies in regions not occupied by Spain which in his father's time

produced promising settlements on the American mainland. His aggressive policy was typically expressed in his charter to Warwick, which authorized the latter to seize ships, sack towns, and conquer territory wherever "the free navigation, trade or commerce of any of our subjects is or shall be denied." These concessions resulted in a few sporadic captures of Spanish vessels, but again it remained for Cromwell to accomplish what his predecessor had only willed. When he expressed to the Spanish ambassador his desire that Englishmen might be allowed liberty of conscience and of trade in the West Indies, that functionary replied that it was to ask his master's two eyes. Instead of pressing a request pronounced so excessive, Cromwell fitted out a fleet and sent it to those waters to seize an island suitable to be a center for English trade. This act in a time of peace could not be justified except by the obsolescent doctrine of "no peace beyond the

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line," and it shocked many people; but the island of Jamaica, thus forcibly acquired, became a center for British trade.

For British trade only, in theory, although the despotism of monopoly was in practice tempered by licenses and by much illegal trading: colonists usually realized that freedom of trade was conducive to prosperity, and practiced it wherever possible. Colonial governors had the double duty of guarding their own monopoly and making breaches in the monopoly of their neighbors. The modern device of persuading conservative orientals to open their ports by means of a naval demonstration is only a milder form of the policy expressed in the commission issued in 1662 by the governor of Jamaica. In it he stated that as the king has instructed him to establish trade with the Spanish islands near by and they refuse to allow it, a force is to be used to attack Spanish traders, and if opportunity offers, to "subdue, take and destroy"

Spanish towns and strongholds, "By which meanes possibly other places in the king of Spaine's dominions may be better inclined to receive the settlement of a trade for his Majestie's subjects."

The best guarded monopolies were those of the great trading companies, whose officials were ever awatch for efforts either by unprivileged compatriots or by foreigners to poach upon their preserves. It is well known that the rapid progress in colonization made by England, France, and the Netherlands was due to the activities of the great companies. By companies the Dutch established their trading posts in the east and the west; companies made the first permanent settlements of the English in America, and when Richelieu set out to rebuild the maritime power of France, it was by founding companies that he laid his plans for colonization. Although at first they were champions of freedom of the seas in their attacks upon the Spanish and Portu-

guese claims, and throughout the period of their power they were aids to sea freedom in the work they did against pirates, they became an important obstacle to freedom in their defense of their monopolies. Sometimes it was against the action of a great company that the cry "freedom of the seas" was raised; sometimes it was the influence of their directors, sitting in the seats of the mighty in the home country, that forced the issues of war or peace according to the interests of the overseas trader.

The influence of the Dutch East and West India Companies had much to do with the success of the treaty which made the first breach in the Spanish colonial monopoly, and in the development of the great carrying trade which showed the first two Stuarts that the United Netherlands bade fair to become a dangerous rival on the sea. The Dutch, moreover, were given, as Grotius had already demonstrated, to strange and disturbing ideas of what was

proper on the sea. Secretary Thurloe made notes of some of these "new maxims and principles" which, in 1650, they were proposing to insert in a treaty with Great Britain. The first was "that there is no peculiar proprietorship of any part of the sea, but it is equally free to all to sail, navigate and fish therein." He found this subversive notion implicit in their specification for free navigation, commerce, and fishing; their assumption that they had equal interests with the British in policing the British seas—which they carefully avoided calling by that name—and their proposal to aid in the task: sending out fleets, not only against pirates, but against all who hindered navigation, as "all exactions at sea are *contra jus gentium*." Moreover, they suggested that they be allowed freedom of trade with the British colonies, and proposed revolutionary changes in the law of the sea. Thurloe's cynical comment was that he did not observe that they pro-

posed to open the Scheldt to commerce, or their Indian possessions to the trade of other nations.

Against these Dutchmen of quaint ideas and increasing maritime strength it seemed desirable to take steps, and the first step was the revival and extension of an ancient device for encouraging national shipping: the Navigation Acts. This meant the erection of a new and formidable barrier both to freedom of trade and freedom of the seas. Charles II felt even more strongly than the Commonwealth men that the Dutch problem was a serious one, and, in preparation for the struggle, he cheerfully renounced the historic opposition of his crown to the Spanish monopoly; in his treaty of 1670 with Spain agreeing with the Spanish ruler that the subjects of one sovereign should not navigate in the seas belonging to the other in the western islands, while pledging that each crown "retain the Lordship of

the Seas, Streights, and fresh Waters in America, which belonged to them."

In the genial enterprise of crushing Dutch commerce, England had an eager co-operator. France, freed from civil war, was under process of rehabilitation at the hands of the great minister, Colbert. One aspect of his policy was to make France self-sufficing, protecting home industries by heavy tariffs; another was to build up her overseas trade. By this means, gold and silver, the only wealth, according to the mercantilism of which Colbert was an eloquent exponent, would be made to flow into the country in return for French goods. Trade was to be built up at the expense of English and Dutch commerce, especially the latter, as Colbert did not believe that English commerce was really formidable. He considered the diminution of Dutch commerce to be quite as important for France as the growth of her own. For the encouragement of the latter, chartered com-



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panies were established, steps were taken to intimidate the Barbary pirates, and convoys were offered merchant fleets to protect them against "all other pirates." The colonial monopoly was enforced with great strictness. The navy was greatly increased, and Louis XIV assumed the rôle of his predecessor Francis I, and announced that he proposed to establish freedom of navigation for his subjects in all seas.

Little by little, before the attacks of French and English, the Dutch were obliged to give way, in spite of the aid of the colonists of both opponents, who preferred unauthorized freedom of trade to being restricted to the exploiting mercies of the mother country. The two governments tried to minimize the dangers of competition by solemn agreement not to trade with each other in Europe or America, but such agreements were hard to enforce. There was a natural interdependence between the different islands of the West Indies, and

between the islands and the mainland, that no acts of Parliament or agreements signed and sealed could conjure out of existence. By the dawn of the eighteenth century, the work of destruction was practically accomplished; the Dutch power had become negligible, and France and England faced each other as the great rivals for colonies and commerce. On the continent of Europe, they fought each other for dynastic reasons and for the balance of power, but on the other side of the world they fought for colonies and commerce: for sugar and spices, for raw materials and markets.

It was during the long series of wars between England and France in the eighteenth and early nineteenth centuries that the question of what was to be the recognized law of the sea in time of war became an intensely embittered one. The position of the belligerents on the more important points at the beginning of the struggle can perhaps most conveniently be surveyed

from the point of view of the proposed Dutch innovations of 1650 and succeeding years. The Dutch proposed that letters of reprisal for injuries be abandoned; that the right to search Dutch ships be no longer asserted; that the flag should cover the goods; that ships carrying contraband goods should not be confiscated; that contraband should be limited to munitions of war, and not made to include money or the necessities of life.

It can be seen at a glance that the proposals were those of a commercial nation; of a people more concerned with their prosperity when at peace than with their advantage when at war. They were proposals which tended to limit belligerent right and to limit it decidedly. Consequently they were proposals that would be opposed by powers strong on the sea and advocated by powers either weak on the sea, or, like the Dutch, powers likely to be

neutrals more often than they were belligerents.

In advocating the principle that the character of the goods should be determined by the flag; that is, that enemy goods should be free on a neutral ship, but neutral goods be capturable on an enemy ship, the Dutch were considering their own interests. They were carriers and not shippers, and the arrangement would tend to make both enemy and neutral trade flow toward them, in a war to which they were not a party, and they avoided war whenever they could.

What was the status of the law of the sea in war at the time of the Dutch proposals? Privateering was the cheapest, the most popular and the most lucrative method of carrying on war. It saved the expense of maintaining a large navy, it paid for itself, as the crown took part of the spoil and the admiralty tenths met the expenses of adjudication. It was exceedingly effective, as it meant the destruction of the

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enemy's commerce and the cutting off of his supplies. The objections to the custom are perhaps sufficiently obvious. To call privateering legalized piracy is inaccurate but descriptive. As a means of acquiring wealth hastily, it was a most attractive occupation. It is, however, significant that by 1650 the "best people" were no longer engaging in it, as they had in the days of Elizabeth. The issue of letters of reprisal in time of peace, for the satisfying of private wrongs at the expense of an innocent compatriot of the evil-doer, could be defended by none of the arguments that were applied to their use for belligerent purposes, and the institution of the reform proposed by the Dutch was only a matter of time.

The right of search lent itself to many abuses. Disputes over it go back to the fifteenth century, and England, as the chief maritime power, exercised it most frequently. The original reason for search was to ascertain whether neutral vessels were

carrying contraband goods, but the British also found it a convenient method of reclaiming British seamen serving under foreign colors. It was a great inconvenience to the trader, and neutrals tended to demand that definite limits be set on the right, and that the ship's papers be accepted as proof of the character of the cargo.

The energetic Queen Christina of Sweden, infuriated at the searching of her vessels, ordered that they travel under convoy, and gave orders that the convoy should resist any search. The coming of peace prevented friction, but the British refused to recognize the claim that a convoy ought to protect vessels from search.

A still more troublesome question was that of the status of neutral and enemy goods. Disputes over the usage go back to the fourteenth century, when it was sometimes arranged by treaty. In 1548, Francis I announced that he meant to adhere to the doctrine of hostile infection. This

meant not only the capture of neutral goods on an enemy ship but a neutral ship carrying enemy goods. The English usage at that time seems to have been the same, although on one occasion it was stated that the rule was followed because it was the enemy's practice. Both French and English usage varied, but the English came to follow pretty consistently the rule of the *Consolato del Mare*, that made enemy goods capturable on a neutral ship and neutral goods free on an enemy ship. They recognized that the flag covered the goods only as a treaty concession.

Since the rule "free ship, free goods" made exception of contraband, its value depended somewhat upon the definition of contraband. The claim of a belligerent to search neutral vessels for contraband was based upon his claim to the right to prevent his enemy from receiving articles useful in war. But what was to be the test? In one of the early Dutch wars, the Spaniards

captured an English vessel laden with tobacco and bound for Holland. Their plea was that this was contraband, as tobacco was an article very useful and necessary for an army, an argument with which, judging from the popularity of tobacco funds, the modern public concurs. In the decision of the court the cargo was pronounced truly contraband. The Dutch made a similar claim years later in the case of a cargo of wines, brandy, salt and tobacco. The earliest English list of contraband specifies arms, munitions, foodstuffs, and naval stores. Elizabeth had many difficulties with the question of contraband. Naval stores for building the Spanish Armada were carried past England in Hanse and Dutch ships; on Elizabeth's denunciation of the practice, the Hanse threatened reprisals. So much difficulty did Elizabeth have with foodstuffs that she resorted to buying such cargoes instead of confiscating them. The Stuarts followed her practice occasionally,



but after the enactment of the Navigation Acts difficulties arose about the illegality of bringing such stores into English ports, since they were not in English bottoms. Charles I in his treaty with the Dutch in 1625 included besides provisions and naval stores gold, silver, copper, iron and lead.

The usage of nations varied in an instructive way according to circumstances. Cromwell, in 1654, in order to secure the right to trade with the Portuguese colonies, agreed to recognize the principle free flag, free goods. In 1674, when the Dutch were at war with France, the English as neutrals were carrying French goods and dealing in naval stores; they made a treaty with Holland recognizing that free flag made free goods, and insisted that naval stores should not be classed as contraband. In 1704, Louis XIV, whose navy was still negligible, was at war with two naval powers and dependent on neutral favor for supplies. He consequently made a bid for neutral sup-

port, issuing a statement of liberal policy and declaring: "The subjects of neutral princes will recognize the care that has been taken to preserve for them the same extent and freedom of commerce that they were accustomed to enjoy in time of peace, notwithstanding the restrictions that England and Holland, whose example we might have followed, have laid upon it."

Another source of friction was the fictitious blockade. As early as the fourteenth century, cases were recorded of the interdiction of trade with the entire coast of a country, although the government taking the action had not the means of enforcing its prohibition. Such action was a great source of irritation to neutrals whose peaceful trade was interrupted. One of the most famous cases in the seventeenth century was that of the blockade of the French coast by England and the Dutch in 1689. Against it Sweden and Denmark made a united protest in 1698, an action which was

a precedent for similar unions in the following century.

The question of the interruption of commerce in war had thus by the dawn of the eighteenth century become recognized as a question of the freedom of the seas, and neutral powers were agitating for the limitation of belligerent right. In this respect as well as in others, the Treaties of Utrecht in 1713 marked an important stage in the controversy. The principles of maritime law recognized in these treaties came to be spoken of as having become thereby a part of international law, as a general European settlement took place at that time. This was, of course, incorrect, but the existence of the impression gave more general currency to the principles involved. The most famous of these was the recognition by Great Britain of the principle "free flag, free goods, and the converse, enemy ship, enemy goods" in her treaties with France, Spain, and the Netherlands. Contraband

was confined to enumerated articles useful in war, and clothing, foodstuffs, metals, and naval stores were expressly excluded. The right of visit was regulated and no persons not belonging to the armed forces of a belligerent were to be removed from a vessel. The ship's papers were to be proof of the contents of the cargo. On the other hand, neutral goods on an enemy ship were confiscable, contrary to the more liberal English usage. Provision was also made for the suppression of piracy. This was one of the crying evils of the day. The heyday of piracy began in the period after the wars of Elizabeth, when privateersmen out of a job swarmed to the Mediterranean and the West Indies and entered upon a career for which their previous training made them not unfitted. The Mediterranean was already cursed by the Barbary pirates, a scandal which different states dealt with spasmodically. The solution lay either in concerted action, or in national treaties, implying

tribute for immunity. Unfortunately, the verdict of the European states was for the tribute, rather than for freedom by international action.

The Treaties of Utrecht had also important economic aspects bearing on our theme. The further breaking down of the Spanish colonial monopoly was indicated by the grant to England of the monopoly of the slave trade with the Spanish colonies, and the right to send one ship a year to the great colonial fair on the Isthmus of Panama. It was also indicated by the confirmation to the Dutch of their trade privileges in the West Indies. A step was proposed toward the removal of economic barriers between France and England by means of a most-favored nation clause. But great outcry was made in England over the proposal to admit French goods. The useful argument that the low prices due to cheap French labor would drive English goods out of the market and reduce the

English workingman to beggary was produced with an effectiveness only too familiar, and that clause in the treaty was not ratified. Some fear was felt in the House of Lords that trade could not profitably be carried on under the restrictions that hedged about the permission to send one ship a year to the Isthmus of Panama, and merchants were sent for to reassure their lordships on that point. It is well known how British ingenuity provided means of transforming that annual ship into a pitcher of Baucis, and how Anglo-Saxon trade in the new world, with its accompaniment of smuggling, went merrily on its way toward international complications.

The Treaties of Utrecht foreshadow the three changes that were to be felt in the eighteenth century struggle for freedom of the seas: the effort to prevent the breaking down of colonial monopoly, the general movement to protect wartime trade by limiting belligerent right, and the spread of

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new ideas concerning commercial relations: advocacy of that removal of economic barriers and establishment of equality of trade conditions which has found its most recent formulation in one of President Wilson's fourteen points. Because of the maritime strength and mercantile enterprise of Great Britain, she was to be most prominent in the first movement; since she was in a position to be the chief loser by curtailment of belligerent right, she was the chief opponent of the second; she had the honor of naming among her citizens some of the chief defenders of the principles of commercial freedom. At the same time the predominance in her government of hard-headed business men who had no patience with theorizers and who had a proper reverence for favorable balances of trade prevented any extensive experimentation with liberal ideas. The controversy between the old school of thinking and the new in the two publications, the *British Merchant* and the

*Mercator*, Defoe's mouthpiece, shows that the British public did have put before it the case of letting down trade barriers and establishing commercial relations which might have prevented a century of wars by substituting mutually beneficial relations for non-intercourse and suspicion. But as has been the case so often before and since that day, the arguments that seemed practical and sensible and business-like won the day; the English manufacturer was not exposed to the dangers of French competition, and instead of becoming friends the two nations remained rivals.





### III

## THE CLOSED DOOR AND THE OPEN SEA

"Aucune Nation ne peut s'arroger l'Empire de la Mer; la liberté de la navigation est établie, ainsi que celle du Commerce, sur la loi naturelle. On ne sauroit mettre trop souvent sous les yeux de toutes les Nations ces vérités simples, qui sont le premier et le principal fondement de leur repos & de leur prospérité."

*Accarias de Serionne, 1766.*



### III

## THE CLOSED DOOR AND THE OPEN SEA

“**A**ND you, Belgians, courage, courage! Continue to defend intrepidly your rights and your freedom, and with them the freedom of the human race!”

These words were not written in August, 1914. They are taken from a pamphlet printed in 1727, and the struggle in which the Belgians were urged to persist was a struggle for the freedom of the seas. Their Hapsburg ruler, the Emperor Charles VI, was embarked upon a project which bade fair to give the Austrian lands something which Hapsburgs have dreamed of from

that day to our own: importance as a maritime power. He had issued a charter to a group of Belgian merchants who were already carrying on a lucrative trade with the far East from the port of Ostend. The Dutch and the English East India Companies, seeing their monopolies endangered, complained to their home governments, which immediately set in motion machinery for the suppression of the Ostend Company. Both governments, through their representatives at the imperial court, advised that the charter be withdrawn. The Dutch ambassador claimed that it violated treaties as well as international law. The Emperor remarked that since the sea was open to all, none could take away from his subjects the right to sail upon it. The English ambassador wisely waived the discussion of treaties based on papal claims always contested by England, and admitted that the Emperor had a right to send his ships where he chose, but intimated that

there were times when the exercise of even indisputable rights was indiscreet, and hinted that the choice of a North Sea port was especially unfortunate.

From requests the diplomats finally passed to demands, and in the meantime a flood of pamphlets, in those days of limited newspaper publicity, did what they could in the way of the manufacture of public opinion. The Belgian pamphlets upheld the principle that "the right to trade in any part of the globe is inherent in all sovereign peoples," and asked the Dutch if they were prepared to combat their own countryman, Grotius, and the freedom of the seas which he had defended, and to secure which they had fought the Portuguese and Spaniards. The Dutch considered it unfair to judge Grotius by a work of his early youth, and felt sure that if he were still alive he would condemn the Ostend Company. The English pamphlets ingeniously combined the pocket-book and

the patriotic appeals. The East India trade in raw silk which kept many idle hands in England busy was menaced; the increase in Belgian trade meant ruinous competition because of the low prices made possible by Belgian cheap labor; Flemish competition had already caused heavy taxation to be laid upon the English poor; the Emperor was aiming at universal dominion, and with the increased maritime strength the company would develop he would be able to lay waste the English coasts; the Protestant religion would be destroyed; the Scheldt would be opened to commerce, and there would be an end to the trade and navigation of England and Holland, "without which the Liberties of Europe can never be maintained and supported."

Years later Pitt stated in Parliament that the English government had had no right to demand the suppression of the Ostend Company, and that the act had probably been a mistake, because of political

consequences involved. But, as the British ambassador had said to the Emperor in language strikingly reminiscent of that of the Spanish ambassador of Cromwell's day, "In attacking our commerce, you fly in the eyes of the English nation." The matter was not allowed to drop, and in the complicated diplomacy of five years, when all Europe was set by the ears because of the necessity of finding suitable wives for the sons of Elizabeth Farnese, the Ostend Company held its own, until finally, in 1731, the Emperor abandoned his maritime ambitions in exchange for the questionable boon of England's recognition of Maria Theresa's claims to the Hapsburg lands.

This war against new companies was not confined to a single instance, or to particular nations. A generation earlier English and Spanish jealousy had sealed the fate of the Scottish Darien company, and the Dutch made deliberate attacks on the Prussian African Company, which the House of



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Hohenzollern had founded in 1682, for the "improvement of shipping and commerce, wherein the best prosperity of a country consists." England and the Dutch again co-operated to protest, in 1728, against a project for the substantial extension of the Danish East India Company, and the project was abandoned, ostensibly for lack of subscriptions. Protests were also made, by the Dutch and others, against the Spanish establishment of the Guipiscoa Company to trade with the Philippines, one of the arguments used being that according to the papal demarcation line the Spaniards were not free to go to the West Indies by way of the Cape of Good Hope. Certain limits were accordingly placed upon the operations of the company.

Although protesting against Spain's venturing into Eastern waters, the Dutch after 1714 had co-operated with Spain in her efforts to maintain the monopoly of her West Indian trade, feeling it an injury that

other nations should trade where the Dutch alone had been granted the privilege. The situation in that region was a troublesome one. The waters swarmed with pirates, and generally indistinguishable from the pirates were the hardy captains commissioned by Spain as *guarda costas* to suppress the pirates and prevent illegal trading. So much did English trade suffer that from time to time English vessels were commissioned to seize these *guarda costas*, but so much trouble arose from these warrants that they were finally suspended. A British officer sent to investigate the situation in 1731 reported that while villainy was "inherent to that climate" and there would always be trouble there, the chief difficulty was due to the illegal trade carried on by Englishmen, who were to be found in those waters in the proportion of fifty vessels to every one of Spain. When it is recalled that one ship a year was all the English were legally entitled to send to the Spanish

colonies, it is obvious that the Spaniards had reason for complaint. That the behavior of the *guarda costas* was offensive is amply attested by Dutch and French complaints of their manner of proceeding. The French government avoided complications by ordering French captains to give security that they would not trade in Spanish waters, but the British traders had friends in high places who were ready to champion their interests. Modern research has established beyond any reasonable doubt the important fact that the immortal Jenkins did actually have his ear sliced off by a Spaniard who was searching his ship for smuggled goods, and that the tale was not a fabrication of the Opposition in their desire to force Walpole into war. The Opposition certainly recognized the recruiting value of the incident. "The tale of Jenkins' ear will raise us troops enough!" exclaimed one member on the floor of the House of Commons. Whether or no Jenkins com-

mended his soul to God and his cause to his country, his country embraced his cause as that of the freedom of British commerce from search by Spaniards in time of peace on the American seas. A breath of Elizabethan air swept through Parliament, as the claim was put forth that "no nation can have such a property in the open seas as may entitle them to interrupt the ships of other nations in their passage to and fro upon those seas, about their lawful business." Pulteney, the leader of the Opposition, represented that "no search, my Lords, is a cry that runs from the sailor to the merchant, from the merchant to the Parliament, and from Parliament, my Lords, it ought to reach the throne." Skillful publicity made the cry a popular one. Such doggerel as

"Jenkins' ear was cut off clean,

The case is clear, the knife was keen."

caught the popular ear, and screeds from sources more august were soon forthcoming.

ing. In the course of the negotiations by which Walpole hoped to secure a peaceful settlement, the cry changed to the slogan "a free sea or war." Castilian pride could not be brought to disclaim in explicit terms what the Spanish government knew could no longer be maintained in fact: the sovereignty of the American seas; and British sentiment was impatient at references to treaties, and to the claim that British ships ought to keep a straight course between England and the English colonies. As one of Horatio Walpole's correspondents put it: "I would as soon quote the authority of Euclid to demonstrate that two and two make four as the terms of any treaty to evince the right of British ships to a free and unmolested passage through the ocean." Diplomacy was fatally hampered by the partisan zeal of the Opposition and by the influence of the merchants who would hear of no concessions that might hamper trade. They put their trust not in diplomacy, but

in the navy. As one member of Parliament expressed it, the British merchant kept the navy, and the navy must defend his interests.

The pamphlet literature that the Ministry circulated for the abatement of the war fever supplied accounts of British atrocities to offset the episode of Jenkins' ear; argued that some of the British West Indian colonies were mere nests of pirates; that all Spain claimed was the right to put an end to the illicit trade with her colonies; that wars were always injurious to a trading nation; and that diplomacy, if given time, could be depended upon to right all wrongs. But these pleas were ineffective beside the Opposition literature, much of which was written by Pulteney, Walpole's bitterest opponent. The same ground was traversed in the parliamentary debates. The argument that the British claim to freedom of the seas was weakened by their pretensions in the British seas was met by the assertion

that whatever rights they possessed there were acquired through the long acquiescence of their neighbors, and that care must be taken to prevent the Spaniards from acquiring by sufferance any similar rights, there being much less justification for dominance in the open sea than in coastal waters. About the right of search there was great debate. Chancellor Hardwicke thought the British position on this point a weak one, and proclaimed his views in a famous debate when the eloquence of the chauvinists was stimulated by the unaccustomed presence of a group of ladies, who had gained admittance by means worthy of a modern suffrage delegation. It is worthy of note that while the popular *casus belli* was the exercise of search in time of peace, the most eminent lawyer of the time did not support the popular view, although it accords with modern usage.

In the Commons, Pitt, in a speech which won him a kiss from the Prince of Wales,

attacked the government with youthful fervor, declaring that the mere submission of the question of search to the discussion of plenipotentiaries was an indignity. The strongest argument of Spain was based upon the agreement made in the treaty of 1670, but those terms were no longer agreeable to the British public. However, if it had not been for the powerful influence of the stockholders of the South Sea Company, whose claims Spain refused to admit, Walpole would probably have succeeded in averting the war into which popular clamor and party intrigue were urging him. It was not a glorious struggle, and it drifted along until it merged into the war of the Austrian Succession, without settling any of the points at issue.

The war did, however, have its effect upon maritime law. The English position furnished precedent for the claim that the right of search was a purely belligerent right, a contention eventually vindicated



and later used against England. During the war, two neutral powers, France and Denmark, made a convention with regard to the protection of their trade, and this convention, which in 1742 was amplified into a treaty, recognized the principle free flag, free goods; regulated the right of visit; limited contraband to articles useful in war; and declared that a blockade to be binding must be effectually maintained. The immunity of enemy goods on a neutral ship was coming to be recognized in an increasingly large number of treaties. Because of its wide recognition, its advocates began to claim that it was a recognized principle of international law, but the British contended that the old law of the sea held where the new principle was not recognized by treaty. They were careful to observe the principle with nations to which they had granted it, except when hard pressed, and in that case they pointed out to the aggrieved party that British Ad-

miralty courts could be depended on to award strict justice. With regard to contraband, also, British usage varied. A decision of the Admiralty court in 1746 was that "provisions are and always have been esteemed contraband." However, some of the treaties excluded them. As to naval stores Great Britain had no fixed policy. By regarding them as contraband in a war with France, she could win a distinct advantage, but it was at the expense of the friendship of the northern powers and of the Dutch, the chief producers and carriers of those commodities.

The British position in these matters was well illustrated by the famous controversy in 1752 with Frederick the Great, a ruler who had no interest in the extension of belligerent right, and who on this occasion won cheaply the reputation of champion of freedom of the seas. Frederick claimed to have been assured by a British official that naval stores were not to be regarded as con-

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traband, and on the capture of some of his vessels he protested violently. A long controversy ensued, and Frederick, having used without effect the plea that by the law of nations free ships made free goods, resorted to an argument of quite a different kind, and stopped payment of the interest on the Silesian loan. This line of reasoning caused Great Britain to compromise the claim, but she made no concessions as to the principles involved. Indeed, the English statement at this time gives a convenient summary of their position. They held that the property of a belligerent was always capturable, but that the property of a neutral was not, unless he had departed from neutrality, as he did when he tried to supply the enemy with the means of carrying on the war. All ships were liable to be stopped and searched for contraband, but by particular treaty this right might be restricted, and in the same way the law of nations might be "inverted" and the principle recog-

nized that the flag covered the goods. In the British statement, the latter procedure seemed less logical than the British, allowing as it did the capture of neutral goods in enemy ships. It was the protection of their own trade, and not abstract principles, for which the advocates of the newer practice were working.

The war of Jenkins' Ear marked a period of general belief in the importance of maritime strength. Spain, already in her decline, made no further concession of her ancient claims; it was even held that her chief reason for not signing a proposed agreement with France, allowing the importation into Spain of French colonial products, was that to mention the existence of French colonies would be a recognition of the right of France to any possessions on the Spanish side of the line of demarcation. There were Spaniards who believed that Spain should put herself into a position to enforce her ancient claims, among them

Bernard de Ulloa, who urged the building up of the Philippine trade, partly because the islands were a valuable source of raw materials, but chiefly as a stimulus to naval power.

It was France, not Spain, that was to be Britain's rival for the next half century. Frenchmen, too, were urging maritime development. Maurepas, the French minister of marine, encouraged Deslandes to write his essay on maritime power and commerce, and although through lack of co-operation between departments, the book was suppressed as soon as it appeared, it was immediately reissued, and was straight-way translated by an Englishman as a warning to his countrymen that France was waking up. Deslandes based his arguments on the success of the English, "who have, at present, the superiority of the sea, the empire of which they openly claim." The strengthening of the French navy under Maurepas, and the development of

French commerce under Fleury, were viewed with alarm across the Channel. England's participation in the war of the Austrian succession was due in large part to her jealousy of France's increasing strength at sea, and in 1748, when war weariness sat upon the nation, the note of warning was sounded in Parliament: England must not desert her allies and leave the French to dominate the peace settlement, for "they would dictate such terms for their merchants that our merchants would have no chance in any market." When peace was at last in sight and the terms of the settlement were being discussed, gloomy forebodings were heard that France might some time be able to deal with the English navy as Rome dealt with Carthage after the second Punic war, and Admiral Vernon assured his fellow-citizens that France had long been aiming to be the dictator of Europe, and that now she was planning to succeed through winning superiority at sea,

by means of manufacturing, colonies, and commerce. He declared that the chief thought of Englishmen throughout the war and in formulating the terms of peace, ought to be given to developing British colonies and commerce and to injuring the commerce and colonies of France.

The peace of Aix-la-Chapelle, besides closing the war of the Austrian succession, was the official end of the war with Spain, but nothing was said in the treaty about the right of search, over which it had been fought. Bitter comments on this fact were made in Parliament, but in ten years men's views had changed, and although there was some grumbling about freedom of navigation, Pitt had come to feel that the Spanish claims had been reasonable and that the war had been a mistake, since it had brought about friendly relations between Spain and France.

In the Seven Years' war, the English improved the opportunity to disappoint

France's maritime ambitions. It was in this struggle that by her uncompromising use of the advantages given her by her command of the sea England first evoked concerted protest from neutral powers. France, foreseeing that she would be unable to control the trade with her colonies during the war, threw it open to the Dutch. England thereupon formulated the famous Rule of 1756: that "a neutral has no right to deliver a belligerent from the pressure of his enemy's hostilities by dealing with his enemies in time of war in a way that was prohibited in time of peace." Her general policy was to win the war by cutting off France's communications by sea, and in protest against her methods of executing this policy two neutral countries, Denmark and Sweden, formed the maritime union of Stockholm to protect their commerce, a step like the one they had taken in 1693. Its chief value was as a precedent; the continued interference with Danish commerce



is attested by the correspondence of Bernstorff, the Danish minister. He referred bitterly to England's unwillingness to allow "the liberty of commerce and navigation due to every free and independent people," and complained that she "after having so long and so gloriously fought for public freedom, now fights only to arrogate to herself the despotic empire of the sea." Such sentiments were highly pleasing to the French minister Choiseul, who had already seen the possibilities of turning to advantage neutral irritation against England. He took measures to prevent any action on the part of French commanders that might give annoyance to neutrals, encouraged the Dutch to "sound the tocsin of the sea against the English," and proposed a maritime league of Sweden, Russia, Denmark, and the Dutch. England by timely concessions prevented Denmark from furthering such a league, and pursued with little change a naval policy which meant such activity for

her privateers that the insurance against them was as high as that against the Barbary pirates. The Dutch and the Danes were between the devil and the deep sea, for the French threatened that unless they succeeded in getting the English to recognize that the flag covered the goods, English goods on Dutch and Danish vessels would no longer be respected by France, although she was by treaty pledged to let them go free. Injured neutrals were bidden by British authorities to expect restitution in the courts, but there were irritating delays, and Bernstorff wrote, in what he admitted to be some excitement, of "*ces Doctors Commons dont le nom va descendre en horreur à la posterité,*" an undeserved severity that would surely have caused a flutter among the wigs and gowns.

When the time came for reaping the fruits of victory, the bases of settlement were colonies and commerce, as Admiral Vernon had wanted them to be in the

previous war. One member of Parliament urged that there was risk of unfavorably affecting public opinion if France should be deprived of all her fisheries in the effort to break her maritime strength; he feared a hostile confederacy might be formed against England if she came to stand for a monopoly of naval power, a system as dangerous as had been the system of Louis XIV against which they had been fighting. But these were not the views of Pitt. He felt that the granting of fishing privileges was a grave mistake, as it would mean the rebuilding of France's maritime power. For the same reason he strenuously opposed the return of Martinique and Guadeloupe, as their trade would help France's naval development, and all gain to England in this respect would be fourfold where it meant a loss to France. He pointed out incidentally that the trade won by Great Britain would more than compensate for the expense of the war. After a long balancing

of the respective advantages of Canada and a West Indian island or two, it was finally decided to retain Canada, and George III little suspected that the decision, by removing French pressure at the north, was the first step toward the loss of the colonies east of that Mississippi River which he confused with the Ganges.

When, in 1766, Franklin was examined in Parliament in order to explain why the Americans were objecting to the sudden enforcement of the machinery of taxes and restrictions which mercantilism prescribed but which had so long remained practically a dead letter, he paid an interesting tribute to Great Britain's efficient performance of police power. Americans felt, he said, "the sea is yours; you maintain, by your fleets, the safety of navigation in it, and keep it clear of pirates; you may therefore have a natural and equitable right to some toll or duty on merchandizes carried through that part of your dominions, towards defraying

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the expense you are at in ships to maintain the safety of that carriage."

How long the Americans remained in the mood thus politely described by Franklin no modern American need be told. The new restrictions interfered with the profitable but illicit trade with the French which was building neat fortunes for American merchants. British merchants engaged in the American trade found payments falling off, and joined their protests to those of the colonials. In so far as the American Revolution was a revolt against trade restrictions, it may be regarded as part of the great struggle for freedom of the seas.

## IV

### BALANCE OF POWER AND BALANCE OF TRADE

"The United States of America have propagated far and wide in Europe the ideas of the liberty of navigation and commerce. The powers of Europe, however, cannot agree, as yet, in adopting them in their full extent. Each one desires to maintain the exclusive dominion of some particular sea or river, and yet to enjoy the liberty of navigating all others. Great Britain wishes to preserve the exclusive dominion of the British seas, and, at the same time, to obtain of the Dutch a free navigation of all the seas in the East Indies. France has contended for the free use of the British and American seas; yet she wishes to maintain the Turks in their exclusive dominion of the Black Sea, and the Danube . . . and of the . . . Dardanelles. Russia aims at the free navigation of the Black Sea, the Danube, and the passage by the Dardanelles, yet she contends that the nations which border on the Baltic have a right to control the navigation of it. Denmark claims the command of the passage of the sound . . . France and Spain, too, begin to talk of an exclusive dominion of the Mediterranean, and of excluding Russia from it. For my own part, I think nature wiser than all the courts and estates in the world, and, therefore, I wish all her seas and rivers upon the whole globe free."

*John Adams, 1788.*



## IV

### BALANCE OF POWER AND BALANCE OF TRADE

**T**HAT astute Frenchman, Choiseul, when he heard the news of the fall of Quebec, remarked that it was an ample subject for reflection by any one interested in the public peace and welfare that when Great Britain held the whole of North America, commerce there would be precarious for other peoples, "and the balance on the sea, on which the balance on land depends, will be irretrievably destroyed."

The opportunity for redressing this balance offered itself during the next war, when the military successes of the Ameri-



can colonists indicated a possibility of ultimate victory; and the French government placed itself behind those of its subjects who were already fighting beside the Americans from pure enthusiasm for the cause of freedom. It is in the light of Choiseul's reflection that we must interpret Louis XVI's statement that his only object in the war was his attachment to the principle of the freedom of the seas. The formula was a convenient one, and provided an excellent argument for the intervention that promised to restore the prestige of the house of Bourbon. Vergennes, Choiseul's successor, used it in persuading Spain to join the war. "The ocean is no longer a common patri-mony: the English in their pride are wield-ing over it a universal dictation to which they will soon be pretending they have a right and title, since they are now exercising it in fact." With this argument were blended skillful references to opportunities for commerce after the war.

In a war so largely naval, the question of belligerent right was bound to come to the fore. In her treaty with the Americans France recognized the principle "free flag, free goods," but as both powers were belligerents this did not bind them in the existing struggle. In June of the same year, France issued a declaration that she would seize not only enemy goods on a neutral ship, but the ship itself, thus transcending Great Britain's practice. A month later this was replaced by regulations that provided that neutral trade was not to be interfered with, except in the case of contraband, or vessels bound for a port where a blockade was being effectually maintained. These terms were revocable at the end of six months if similar concessions had not been made by the enemy. A recent writer has suggested that France's championship of "free ships, free goods" at this time was due to pressure brought by her American allies; this was probably a con-

tributory reason, but sufficient explanation seems to lie in the fact that Great Britain's procedure was arousing indignation among neutral powers, and that this indignation might be turned to account if France took the opposite stand. Certainly her efforts in that direction were unceasing and not without success.

Great Britain had by treaty with the Dutch recognized the immunity of enemy goods, not contraband, on neutral vessels, and excluded naval stores from the list of contraband. Nor were they on the contraband lists in her treaties with Sweden, Denmark, and Russia. To cut off such supplies from France became a point of increasing importance, and many captures were made in contravention of treaty right. Englishmen are justly proud of the standards maintained by the High Court of Admiralty, although prize decisions were unfortunately not always above criticism, and damages were in the end duly paid, but

the aggrieved powers were not satisfied to await tardy compensation for their interrupted commerce. At the beginning of the war England seized Dutch ships bound for America on the ground that treaty provisions did not apply to a rebellion. Later she agreed not to interfere with Dutch commerce except in contraband, but declared that in future contraband would include naval stores. The Dutch resorted to convoy to protect their trade. On the one hand England requested them not to use convoy to protect naval stores; on the other France threatened to withdraw neutral privileges from them if they did not defend their treaty rights. After a long period of attempts to run with the hare and hunt with the hounds, they concluded they had better lose England's good-will than their carrying trade, and convoyed cargoes of naval stores.

In the meantime, Vergennes was endeavoring to utilize neutral hostility to British policy. He urged a common agree-

ment of France, Spain and the Dutch to protect the freedom of their commerce and navigation. With greater success he set to work to stir up the northern powers to defend their commerce, and he was aided in this by Frederick the Great, one of whose vessels had been seized by the English. He began by the threats he had used with the Dutch, to mete out to them the treatment they submitted to from Great Britain. He then proposed a concerted armament, such as had been employed to little effect in 1756. Catherine II, infuriated by the activities of American privateers, suggested to Denmark a combined fleet to keep privateers out of the northern seas. Denmark replied with a proposition for a joint combination to persuade Great Britain to recognize the principles adopted by the Franco-Danish treaty of 1742. But at the moment the star of England was in the ascendant in Russia, and Catherine persisted in her own plan, which would have meant the protection of

English as well as neutral vessels against American and French privateers. The French representative in Russia objected that the plan was not consonant either with the rules of neutrality or with the principle that the seas of the world are common to all, upon which Catherine had acted when she sent a fleet into the Mediterranean. He finally, with Frederick's aid, persuaded her to limit her plan to territorial waters. When finally announced, it was backed by Sweden, and included a proclamation for the neutralization of the Baltic, which laid down the principle that "the Baltic was excluded by nature from the intrusion of all the power of Europe, but such as had dominions situated upon it." The belligerent powers, anxious to placate the neutral states where it could be done cheaply, eventually sanctioned this arrangement, although protest was made in the British Parliament against the idea "that God Almighty intended that these three powers

should govern exclusively over this vast sea."

For many months the representatives of France and England labored with Catherine, the one to convert her to the theory of England's "tyranny of the seas," the other to prevent her conversion. The most difficult point of doctrine for the latter to defend was the English extension of contraband to include naval stores. Catherine had wide ambitions for the future of Russian commerce, and naval stores were its staple. Although her ships, like her cities, existed for the most part on paper and in her imagination, they were to spring into being, like mushrooms, overnight. And British policy provided no favorable soil for a crop of that sort of mushroom.

Action was precipitated by Spain, which announced that as England did not respect the immunity of the neutral flag, it would no longer do so. France earnestly remonstrated with her ally, representing that

“nothing could be more contrary to the principle of freedom of the seas than the interception of innocent cargoes.” Vergennes was most anxious to convince public opinion that the war was not a struggle between monarchs but a contest for the public interest and for the freedom of the seas. But Spain persisted, and seized a Russian vessel bound for Cadiz. Russia protested against what one of her ministers called the extension to the seas of the principles of the Inquisition. Then within a fortnight Catherine was shocked at the news that the British had seized a convoyed Dutch fleet, and infuriated at Spain’s seizure of another Russian vessel. She wrote to her friend Grimm that he might expect something volcanic. The eruption was the famous declaration of armed neutrality of 1780. In it Catherine laid down as principles she intended to defend the rules proposed by Denmark some months earlier; freedom for neutrals to trade with belliger-



ents; free ships, free goods; contraband limited to munitions of war, exclusive of naval stores; a blockade not binding unless effectually maintained. Behind this declaration was a genuine belief that the right moment had been seized for establishing principles of neutral right which would prevent the interruption of commerce in a maritime war, and would in future prevent misunderstandings in matters of sea law due to "ill-defined words, different points of view and diverse appreciations." The modern reader thinks sadly of the Hague conferences and the discussions of the Declaration of London.

There is no reason for doubting the sincerity of Vergennes when he expressed the hope that out of this movement might come a new code of sea law which would lessen the frequency of wars. But, as he also argued, France had not enough sailors for both a merchant marine and a navy, and having to depend on neutral carriers her

interests demanded that she champion the limitation of belligerent right. The more free was the movement of neutral ships, the more France profited. He used these arguments with Spain, and it was French influence which persuaded Spain to give up its recent policy and join the Armed Neutrality. On the other hand, Vergennes concluded that the commercial advantages France might secure if Portugal did not join would be considerable, and he used his influence, though without success, to prevent her giving her adherence. There has always been a tendency to question Catherine's sincerity in the matter. It is quite true that as a belligerent she had not observed the principles of the code, nor did she observe them when again a belligerent after 1780. On the other hand, in 1786, she broke off negotiations for a promising commercial treaty with Great Britain because the latter power would not recognize the code.

The United States welcomed the move-

ment enthusiastically, and American vessels were ordered to observe it; for American statesmen approved the theory of the new code and recognized in the armed neutrality a shrewd blow at Great Britain. This latter was the general impression of Catherine's act. Frederick the Great said that she was entitled to have herself pictured as avenging Neptune, "returning to him the trident which usurpers had torn from him," and "conducting the pirates that her wisdom knew how to bind to her triumphal chariot." But the "usurpers" and "pirates," though aghast at the formidable movement headed by Catherine, had no intention of being bound to her triumphal car. Shelburne pointed out in the House of Lords that the new maritime code meant farewell forever to the maritime power and glory of Britain, as her superiority at sea depended upon her power of cutting off supplies of naval stores from her enemies. John Adams, never inclined to be over-kindly toward England,

recognized her quandary as to blockade. As he saw it, "If the king gives up his interpretation of the word, there is an end forever of the naval superiority of Great Britain. If he maintains it, it must be by a war against all the nations that use the seas."

Determined not to be impaled on either horn of the dilemma Great Britain firmly seized both. English diplomacy busied itself at neutral courts, and Denmark's adherence to Catherine's league was decidedly weakened by a convention signed within the fortnight recognizing naval stores as contraband. England's diplomacy with Sweden had less tangible results, but her declaration of war against the Dutch prevented their profiting by their adherence to the reformed principles. Whether because of British diplomacy or not, the defense of the Armed Neutrality was not vigorous enough seriously to hamper England's prosecution of the war, although its activities on paper were somewhat extensive. Joseph II and

Catherine made an agreement to work in concert, at the return of peace, to secure the general acceptance of the new code as the basis of international maritime law, and the former submitted to the empress his "Reflections on the freedom of the seas," in exchange for her views on the subject. She rejected, however, in her dislike of following the lead of others, the proposal of the king of Sweden that a conference be held at the Hague or elsewhere to draw up a maritime code on that basis.

A new British ministry, in 1782, concluded that an alliance with Catherine would be worth the sacrifice, and twice notified her that the king was ready to rise above prejudice and accede to her maritime code. But Catherine would not abandon her neutrality. A similar offer was made to the Dutch, but later withdrawn. Our government's application to join the Armed Neutrality was rejected because of our belligerent status. But as time went on it lost

its first fine careless rapture, and our representatives at the peace conference were instructed that, although a recognition of the new principles was desirable, they must not pledge our armed support to them.

A general falling away of interest prevented any steps being taken at the peace conference toward agreement upon a maritime code. Efforts were made, but they were abortive. Each nation had its own preoccupations. The Armed Neutrality had secured for the Baltic powers the recognition of an important claim. Prussia and Russia had joined Norway and Sweden in the claims to control the navigation of the Baltic which England and the Dutch had opposed in the first two decades of the century. The conventions of Russia with Denmark, Sweden and Prussia for upholding the Armed Neutrality included six additional articles declaring the Baltic free for commerce but closed to ships of war. England, although objections were raised

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against recognizing this claim to exclusive rights, judged it discreet to do so. France, with a certain logic regarding freedom from warlike operations as freedom of the seas, expressed her adherence to the claim explicitly as a special sign of friendliness to the powers that were comporting themselves as the protectors of freedom of the seas. Thus freedom of the seas became a matter of individual interpretation, and as John Adams, who regarded freedom as an American invention, shrewdly observed at the time of the peace conference, each nation had its special seas or streams from which it wished the right to exclude the others, but desired to have all other waterways on the globe entirely free.\*

This spirit of nationalistic exclusivism was the spirit that dominated the debates in the British Parliament that marked the closing period of the war. That the real object in dispute was the empire of the

\* The passage is quoted at the head of this chapter.

seas; that the loss of the continental colonies would be followed by their conquest of the West Indies; that the Americans would create a navy which, with France's aid, could drive the British from the seas; that this would mean the loss of India and the confining of British enterprise to the British isles—these were the asseverations of prominent statesmen. The chief aim of Englishmen therefore ought to be the destruction of French maritime strength; indeed, Sheridan feared that if peace were made while the House of Bourbon was equal in maritime force to Great Britain, it would be the end not only of the commerce and prosperity, but of the civil liberties of Great Britain.

Yet some of the leaders of thought in England, as well as in France and in America, prophesied differently. Diderot in his *Encyclopedia* had expressed the belief that the world had reached the point where internationalism was a genuine force; where



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nations could never again be worked up into frenzies of hatred for one another: that since commerce had established bonds between all peoples, making the inhabitants of one country dependent upon those of others for the products of their toil, the welfare of each nation was bound up with that of all others, and that the prosperity of every country was to be desired by all the rest. These were not the rosy dreams of a single idealist; they were a part of the attacks made upon mercantilism by the physiocrats in France, in England by Child, Dean Tucker and Hume, and given widest currency in the work of Adam Smith. They seemed so reasonable that certain statesmen set out to act upon them. Shelburne and the younger Pitt in England; Adams, Franklin and Jefferson in America, and Vergennes in France, were all believers in the mutuality of trade and the interdependence of trading nations; they followed Adam Smith in the belief that the elaborate

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system of laws and restrictions with which the trade of nations was burdened were hindrances and not helps to prosperity and development. In their efforts they were confronted by the massed forces of conservatism, by satisfaction with the *status quo*, by the suspicion that successful business men of all ages have of "theorizers" and "idealists." The new ideas above all had to make way against the dogged determination of individuals and groups to protect their interests at all hazards, and to let no notions of universal brotherhood or international good-will, or any theories of trade that savored of such impracticalities, bring risk of alteration to favorable balances of pounds, shillings, and pence.

The struggle was begun in the negotiations for the peace which closed the American war. Oswald, whom Shelburne sent to Paris, was a disciple of Adam Smith; Franklin had long been a convert to freedom of trade, and Jay and Adams held

similar views. Gerard de Rayneval, whom Vergennes sent to London as special representative, and who was later to write a treatise on freedom of the seas, agreed with Shelburne that commercial monopoly was an "odious invention." These men believed that absence of barriers to commercial intercourse was quite as important as satisfactory territorial arrangements, and they were ready to go farther than their governments would follow. A provision for direct commerce between America and the British dominions was expunged by the Cabinet as impossible under the Navigation Acts. But as Shelburne pointed out in Parliament, the cession of Senegal by France meant a breach in the monopoly of the gum trade, and the English cession of the Canadian hinterland meant giving up a monopoly of the fur trade which England had maintained at vast expense and which had profited a few merchants only. Freedom of navigation on the Mississippi was to be secured,

and the Americans kept the right to fish off Newfoundland. They based their claim to the fisheries on the principle that "the sea cannot in its nature be appropriated; no nation can put its mark on it." It was the vigilance of Adams that secured the recognition as a right and not as a liberty.

Shelburne believed that a treaty of peace was satisfactory in proportion as it recognized the principle of freedom of trade, and defended the treaties vigorously on that ground. He maintained that England might well make further extensions of the principle; that with its favorable geographic position, its capital, and its enterprise, it ought to say: "Let every market be open, let us meet our rivals fairly, and we ask no more."

With this proposal, worthy of a nation of sportsmen, the English ministry closed a struggle which had begun as a protest against English mercantile exclusiveness, and had been carried on in a spirit of eager-

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ness to destroy the power of England's great commercial rival. The omen seemed good. Across the ocean was a new nation which had come into existence in vindication of freedom of commerce. Across the Channel lay France, which had fought the war as the champion of freedom of the seas. What prospect could be fairer?

## V

### TRADE BARRIERS

"In general, I would only observe that commerce, consisting in a mutual exchange of the necessities of life, the more free and unrestrained it is the more it flourishes, and the happier are all the nations concerned in it. Most of the restraints put upon it in different countries seem to have been the projects of particulars for their private interest, under pretence of public good."

*Benjamin Franklin.*



## V

### TRADE BARRIERS

**A**DAM SMITH published the *Wealth of Nations* in 1776. It completely exposed the fallacies of the old system of colonial monopoly and restriction, and constituted a mine of arguments for freedom of commercial intercourse that has been worked industriously from that day to this. But Adam Smith was not a wild-eyed reformer, and he included in his treatise two statements which greatly comforted the type of mind that goes in fear of freedom. He approved the navigation acts, restrictive though they were, as measures conducing to national security, and he conceded that tariffs, although



commercially undesirable, as were navigation acts, might be useful as an economic weapon for retaliatory or bargaining purposes. These concessions to political expediency proved very useful in stemming the tide of economic freedom, and in England, France and America helped prevent the full success of the movement for freedom of commerce which would have meant freedom of the seas.

It had been the expectation of Frenchmen that after the Revolution Americans would refuse to trade with their late enemies, and that their French allies would fall heir to this lucrative commerce. This was not the case. Even before peace was made, Frenchmen complained that Americans were trading with the British, a complaint which Gouverneur Morris neatly answered by saying that the French had only themselves to blame, for by championing the principles of the Armed Neutrality they had given the British the opportunity to

send their goods in safety to the new world, and that as men will always buy in the cheapest market, regardless of political affiliations, the Americans were buying those goods.

The colonists were used to British goods, and looked forward eagerly to the re-establishment of pre-war conditions. Moreover American merchants anticipated, as one of the blessings of peace, resumption of undisturbed traffic with the British West Indies. It was a rude shock when they found themselves, as aliens, barred by the Navigation Acts from the trade which as British subjects they had enjoyed without question.

The Americans had a powerful advocate in England. Popular prejudice against the liberal ideas of the treaties of 1783 had led to the fall of Shelburne's ministry, but Pitt also was a firm believer in the freedom of trade. Hoping to retain the bulk of their custom by cultivating their good-will, he

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drafted a bill for commercial relations which would have put Americans on the same footing as British subjects both as to trade with England and with the West Indies. The West Indian colonists and the merchants trading with America favored the bill, but the shipping interests were violently opposed to it. It was attacked as meaning a total revolution in British colonial policy which might wreck the entire structure of British trade. The Navigation Acts had given Great Britain the trade of the world, and if they were altered to allow any nation to bring into England any goods not of its own production, or to permit any nation to trade with the British colonies, the marine of England would be lost.

So strong was the opposition to the bill that Pitt withdrew it, and the victory of restrictionist policy was voiced in the Order in Council of 1788, which limited the trade between the United States and the West Indies to a few articles, carried in British-

manned and British-owned vessels; a measure that was received with indignation by the West Indian planters as well as by Americans. France also allowed only restricted relations between her West Indian possessions and her late ally. On being rallied by Adams for adopting the principles of the English Navigation Acts, the French ministers disclosed that they followed Adam Smith in the advocacy of restrictions intended to provide nurseries for seamen and to increase the national strength by the creation of a strong merchant marine. Not only was it evident that they intended to continue their restrictive policy, but there were indications that they would endeavor to influence the Dutch and the Danes in the same direction.

What course should the United States adopt? Her tone had been that expressed by Patrick Henry: "Fetter not our commerce, Sir; let her be as free as air!" John Adams had declared that the Americans

“aspire after a free trade with all the commercial world.” Franklin said: “It is possibly an erroneous opinion, but I find myself rather inclined to adopt that modern one, which supposes it best for every country to leave its trade entirely free from all encumbrances.” Franklin and Adams apparently had been the most active members of the committee of the Continental Congress which in 1776 had drawn up a draft treaty to be used as a basis for treaties, and their draft embodied the ideas of eighteenth century liberalism, in the maritime provisions favorable to neutral right, and commercial provisions providing for reciprocity instead of bargains and concessions. The treaty with France in 1778 followed this draft closely, as did the treaty with the Netherlands in 1782 and that with Sweden in 1788. Frederick the Great was very anxious to secure the American market for Prussian goods, and in 1785 signed the famous treaty in which Franklin had secured the insertion of

a proposal which he had urged in vain upon the British commissioners for the treaty of 1783; a provision securing the immunity of all peaceful commerce in time of war. Contraband was limited to arms, munitions and military stores, and contraband goods while they could be requisitioned could not be confiscated. Neither the treaty of 1778 with France nor that of 1785 with Prussia coupled with free ships, free goods the opposite principle, recognized at Utrecht, of enemy ships, enemy goods, but it was included in the treaties with the Dutch and with Sweden.

Great Britain, finding that the American trade was coming to her under the existing situation, refused to make a commercial treaty. As a result of disappointing experience, a change came over the spirit of the dreams of American statesmen, and they reluctantly came to the conclusion that as the new ideas were progressing so slowly, it might be necessary to gain concessions

by threat of reprisal. Adams professed our willingness to throw open all our ports unrestrictedly to Great Britain; "but the United States must repel monopolies by monopolies and answer prohibitions by prohibitions." Madison declared his preference for perfect freedom of trade, "but before such a system will be eligible, perhaps, for the United States, they must be out of debt; before it will be attainable, all others must concur in it." Even the ardent Jefferson said resignedly: "I suppose we may be obliged to adopt a system which may shackle them in our ports, as they do us in theirs."

The system was already in the making. The various states, beginning with low tariffs for revenue, were replacing them by protective and prohibitory tariffs, and the necessity of having a unified commercial policy, if any concessions whatever were to be obtained from foreign nations, were determining factors in the movement which resulted in the adoption of the federal con-

stitution. The necessity of a revenue, and the desire for an economic weapon, led even the advocates of unrestricted trade to concur in the movement for a tariff. A representative from Pennsylvania obligingly offered as a substitute for Madison's modest tariff for revenue, one framed with an eye on Pennsylvania's infant industries. For the next seven weeks, Congress wore a highly modern air. The interests of the various sections were considered with as much tenderness as conflicting interests allowed, and although the resulting duties seem ridiculously low to the eye trained to look without flinching upon a modern tariff schedule, the first step had been taken, and the nation is still paying the costs.

Madison argued in favor of discriminating tonnage duties as a means of building up a navy which might "prevent the horrors of war," and also as an economic weapon to secure concessions; since the prospect of Great Britain's relaxing her navigation laws



was negligible. The result was legislation copied after the principle of the British laws, laying differential duties on American and foreign tonnage, and allowing a reduction of duty on goods imported in American vessels.

The theoretical justification of America's abandonment of the principles of commercial freedom for which she had fought was provided two years later by Alexander Hamilton's famous report on manufactures; an ingenious adaptation of the ideas of Adam Smith to fit an essentially mercantilist foundation, which has been a bulwark for protectionist argument ever since. He argued that the United States must be made independent of other countries for military and other essential supplies; that if all nations gave perfect liberty to commerce and industry the United States perhaps would not need to encourage her manufactures by a tariff, but that under the circumstances she was forced to do so.

Thus, at the very outset of its career as a nation, the United States decided for the well-trodden path, and abandoned the wilderness trail toward entire commercial freedom upon which it had set out so bravely.

While Americans were avoiding any too-startling innovations, Pitt was taking some bold steps in the direction of commercial freedom. His attempt at the economic solution of the perennial Irish question was ill-starred. Already the agitation of Ulster volunteers, parading Dublin with cannon marked "free trade, or *this*," had led to the repeal of some of the export laws, but by 1785 there was a cry for the protection of Irish products from English competition. There was also a familiar-sounding agitation for an Irish republic. Pitt's plan was to put the commerce of the two islands on a common basis, but it was defeated by a combination of British manufactures dreading Irish competition, and by the political

maneuvers of Fox, who represented the plan as likely to give into Irish hands the direction of commerce and the sacred navigation laws. Thus was lost the opportunity for what might have meant the permanent settlement of the Irish question.

Pitt had better luck with the commercial treaty of 1786 with France, for which he secured fair consideration by putting it in charge of William Eden, an able negotiator, who had declared in Parliament that while the existing British system was not in harmony with abstract theories of commerce, the nation was faced with a concrete situation in the form of pending commercial treaties, and the system in being was vital for the "peculiar situation" of Great Britain. It was Dupont de Nemours who had secured the insertion in the treaty of Paris of the provision for a commercial treaty. Gerard de Rayneval was the negotiator on the side of France. The treaty marked a concession of naval policy on

England's part in the recognition of the immunity of enemy goods on neutral ships, and the exclusion of provisions and naval stores from the definition of contraband; on both sides it meant the abandonment of an appreciable number of the high duties and prohibitions that from time immemorial had hampered intercourse between the countries. The debates about its acceptance in England centered for the most part upon the question whether France was to be regarded as the natural and perpetual enemy; whether by substituting a near market for distant ones Great Britain would destroy her naval superiority and no longer be able to defend the liberties of Europe and the rights of small nations against France's lust for domination, or whether by securing a new market for her manufactured goods, the materials for which she gathered from all corners of the earth, she would really increase her maritime strength. In the Lords, Shelburne, now Lord Lansdowne,

declared that the American war, the increase of smuggling, and the opinion of merchants had demonstrated that the old restrictive system of commerce was founded on erroneous principles; that the idea of wars for territory and trade was every day losing adherents, and that the English ought to rejoice at the prosperity of a foreign country when it was won by fair means. In that stronghold of conservatism these opinions were obviously less popular than those of a Welsh bishop who regarded the French as the enemies of the liberties of Europe, and uttered the amiable opinion that the treaty was only desirable if its effect would be to ruin French industries.

What insured the acceptance of the treaty was the fact that Eden, during the progress of the negotiations, had thoroughly canvassed opinion in commercial circles, convinced merchants that the treaty was being framed to meet their interests, and brought mercantile opinion to the point of

believing that the "existing situation" would make the opening of French markets beneficial to British trade, although gloomy forebodings were expressed lest the light wines of France supplant the good traditional gout-producing port.

In France, the ideas of the physiocrats had made great progress through the energetic championship of Turgot, and later of Vergennes. Dupont had succeeded in convincing Vergennes in 1782 that one way of avoiding a war with England would be to open the French colonies to British trade, and that such an act would in the end be advantageous to French commerce. However, the minister decided that the risk of losing such a profitable trade was too great to be taken, since there was no hope of persuading other countries simultaneously to abolish their colonial monopolies. In the same way, a royal decree of 1785 recognized the theoretic advantages of the doctrine of free trade, but announced that until com-

plete reciprocity was possible French industry would receive protection. It was in the hope of securing such reciprocity with England that Dupont had secured in the treaty of Paris the insertion of a provision for a treaty of commerce, and the treaty of 1786 was largely his work. There is no doubt that the skill of Eden and the firmness of Pitt secured greater specific advantages for British merchants than were obtained for the French, and the treaty was very unpopular in France. Although the trade between the two countries increased enormously, it was pointed out that the balance of trade was in England's favor, and there was no reticence on the part of individual manufacturers whose business suffered from English competition. The short time during which the treaty was in force makes it impossible to estimate its effect with any exactitude, but it is significant that a by no means progressive commission reported to Napoleon in 1802 that on the

whole it had been beneficial, and so far from injuring French industry had stimulated it. Its most important effect lay in another direction. When the treaty was first laid before Parliament, one member expressed great disappointment that no provision had been made for the avoidance of war by submission of disputes to arbitration. But indirectly that end was attained, for the improved understanding between the two nations, due to the commercial intercourse under the treaty, probably prevented the two countries going to war in 1787. The taste in each country acquired for the goods of the other led to continued intercourse even under the unpromising conditions prevalent during the Napoleonic wars.

It might be supposed that the French Revolution, permeated with modern thought and sweeping away old abuses, would have made havoc with the old mercantilist ideas. But while the Revolution did away with the barriers to internal trade, it had singularly



little effect upon commercial practices. While in the assemblies revolutionary leaders were declaiming pure theory and idealism, their committees on economic affairs were holding matter-of-fact meetings where they discussed the testimony and considered the petitions of merchants and manufacturers, and for the most part the decisions of the assemblies, so radical along political lines, in economic matters followed the conservative reports of these committees. Two manufacturers and a merchant drafted the first two reports on commercial policy made to the national assembly. Both reports paid lip service to the new ideas. "Among a free people commerce must not be enslaved," but freedom was to be interpreted in the sense of protection to national commerce and security for home manufacturers. England's commercial policy was based upon her tariff, and freedom of commerce should not be adopted by France unless every other nation was ready to

embrace it. The tariff proposal submitted with this introduction was drawn up after many interviews with merchants and manufacturers, and a careful perusal of petitions for protection of the petitioners' product. The proposed schedule provided a sensible increase over the existing one. The Assembly, while not inclined to revolutionary economic measures, was not prepared to make higher tariff walls already formidable, and the voice of progress was not entirely silent. One member took the ground that the prohibitory system, far from being advantageous to Great Britain, had lost her North America, and left her without an ally in Europe. He believed that France was not ready for free trade, but that she ought to lower her tariff and abandon prohibitions. The Assembly, while feeling perfectly competent to deal with political institutions, felt it wiser to leave trade matters to those who knew about them. However, it agreed to call for a new report,

and it enlarged the committee. One of the new members was Dupont de Nemours, and his hand has been seen in the final report, which greatly reduced the number of prohibitions and export duties, lowered many duties, and admitted free many foodstuffs and raw materials.

Besides adopting this report, the Assembly took steps along familiar lines to increase the country's maritime resources. The importation of foreign-built vessels was prohibited. Bounties on fish were established, and foreign fishing prohibited. The last change was advised specifically on the grounds of England's control of the seas. "We must divide that empire with her, or rather we must free the seas in order to fraternise upon them with all the peoples who can and will associate with us in a free, frank and untrammelled commerce."

The immediate steps toward freeing the sea included the invasion of the Netherlands and the opening of the Scheldt to

commerce. This brought the French republic into conflict with two features of British policy. The Scheldt had been closed to commerce by a solemnly attested treaty, and it was felt to be a fundamental necessity for British security that the Netherlands be kept from falling into the hands of one of the great powers. Arguments against French revolutionary principles and practice were mingled with warnings of the danger to trade, and to England's dominion of the narrow seas, of a French occupation of Belgium, in the debates which preceded England's entrance into the war.

The war hastened the adoption by France of the policy of restriction to which it was then generally believed Great Britain owed her maritime greatness. Again and again the project of a navigation act had been put forward, with deprecating speeches admitting that its principles were not in accordance with the doctrine of unlimited commercial liberty. But such liberty was

dismissed as suitable only to the system of a universal republic, probably as difficult of realization as that of Plato. It took Barère, the Anacreon of the guillotine, to sweep the bill through the assembly on September 21, 1793, a date chosen in order that on the anniversary of the day when in establishing the republic France had proclaimed "the freedom of France or rather the freedom of Europe," she should proclaim "freedom of commerce or rather freedom of the seas." We who are accustomed to the logic by which the Germans claimed that the increase of German naval power and the application of barbarity to naval warfare were steps toward freedom of the seas ought to have no difficulty in following the arguments by which Barère convinced his audience that the French Navigation Act, copied after that of England, would be a weapon of emancipation, whereas the English act was infamous and based on forgetfulness of the rights of other nations.

Thus eighteenth century idealism recognized the theory of commercial freedom that would have meant real freedom of the seas, but bowed in practice to the arguments of the ledger of the man of business and reared new trade barriers instead of letting down the old. France and America acted logically when they supplemented this policy of trade restriction by imitating the British policy and enacting navigation acts, in order to prepare in advance naval forces to fight the wars which the policy of mutual restrictions would inevitably engender.

At the same time eighteenth century individualism adopted and extended the theory that freedom of the seas in time of war could be secured by limiting belligerent right in favor of the neutral trader. The extension of immunity from capture to all private property, which was implied in the treaty of 1785 between the United States and Prussia, was congenial to an age that conceived of wars as contests to be limited

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as far as possible to the armed forces of the belligerents. As long as this theory held, it was natural that sea freedom should be measured by the extent to which the merchant could go about his business untroubled by war, and that the immunity of private property from capture at sea should come to be regarded as a synonym for freedom of the seas.

## VI

### FRANCE AND FREEDOM

**"France has fought on land for her freedom and her natural boundaries; she now means to fight on the sea, not for herself alone, but to liberate the ocean and emancipate all peoples who are victims of England's cupidity. It is not alone the wrongs of many centuries that she wishes to avenge to-day; it is for the interests of Europe and all humanity, that she intends to establish the freedom of the seas."**

*Talleyrand.*

**"The little finger of France in maritime depredations is thicker than the loins of Britain, and the safety of the civilized world not yet subjugated by France greatly depends on the barrier opposed to her boundless ambition and rapacity by the navy of England."**

*Timothy Pickering.*





## VI

### FRANCE AND FREEDOM

**T**HE war between England and the French Revolution took on from the outset the character of a commercial struggle. The faction in control of the French state believed that the prosperity of Great Britain was apparent rather than real, and would collapse with the undermining of her overseas trade, and that French commerce could be made to increase at the expense of British. Great Britain resorted at once to the device of weakening her opponent by cutting off food supplies. Even before the declaration of war, she was detaining grain vessels bound for French ports, and she promptly secured

agreements with Russia, Spain, Prussia and other powers to aid in intercepting cargoes of food and naval stores, and to injure French commerce wherever possible, so as to "bring her to just conditions of peace." An Order in Council of June, 1793, authorized the detention of all vessels carrying breadstuffs to a French port or a port occupied by France. The northern powers were notified that fleets in the North Sea and the Baltic would enforce this order. Denmark entered a dignified protest, defining her conception of the rights and duties of neutrals. She also protested to Russia against her abandonment of the neutral code. Another Order in Council attacked the trade with the French colonies, according to the Rule of 1756, but the Americans secured a modification on the ground that since 1778 the French West Indian trade had been partially open to them. By declaring a blockade of the West Indies, Great Britain then pursued her in-

tention of cutting off the French colonies, and also applied to the American trade a doctrine that Lord Hardwicke had sketched in 1756, that the American custom of landing the products of the West Indian islands in a neutral country and then trans-shipping them to an enemy port did not break the voyage, and that the cargoes were capturable. This device, destined to become famous as the doctrine of continuous voyage, together with the British procedure of treating foodstuffs as contraband, meant serious injury to the trade of America, swollen to huge proportions since the outbreak of war. The absence of any agreement regulating the relations between the United States and Great Britain was strongly felt, and the project was repeatedly brought forward of enacting the principles of the English Navigation Act in order to bring pressure upon England to lead her to agree to a commercial treaty. Jefferson was finally converted to the idea,

and Madison introduced resolutions providing for the taxation of vessels of nations having no commercial treaty with the United States, and excluding the vessels of nations that excluded American vessels. The party led by Hamilton, who were advocates of keeping on good terms with England and avoiding any steps which would hamper commerce, attacked the resolutions, ridiculing the idea "that trade is to be made free by imposing more and greater shackles upon it." The discussions were still going on when Washington transmitted to Congress a report of the damages done to American commerce by the acts of belligerents. Congress decided to use Jefferson's plan of economic pressure as a substitute for war, and voted an embargo. Washington believed more in negotiations than in embargoes, and sent Jay to England to endeavor to obtain a commercial treaty. Jay was appointed at Hamilton's suggestion, and represented the Federalist

policy of avoiding trouble with England at all costs. He was instructed to seek reciprocity in the West Indian trade, recognition of the immunity of enemy goods under a neutral flag, and general security for neutrals. As is well known, the treaty he secured covered none of these points, but recognized the British usage as to capture, and put Great Britain on the most favored nation basis, freeing her trade and limiting our own. As by our treaty with France : recognizing that free flag made free goods, British goods on American vessels were protected from capture, it would have been most desirable to secure immunity for French goods on the same conditions; but it was a concession that England would have been very unlikely to make. The concession that foodstuffs were contraband was a second indication that Americans had gone a long way from their position in the days of the Armed Neutrality. The treaty put our trade on a definite footing, and

indemnity was secured for vessels captured in contravention of agreement. The Federalists believed the arrangement infinitely preferable to a war, but Republican opinion denounced the treaty as sacrificing America's most cherished principles.

The French had not been behind the English in making war on commerce. Their decree ordering the seizure of foodstuffs or enemy goods bound for England antedated the British edict. Rewards were offered privateers for bringing in provision ships, and Genet was despatched to America, his pockets bulging with letters of marque, and his instructions bidding him obtain a liberal treaty, "in which two great peoples shall suspend their commercial and political interests, and establish a mutual understanding to defend the empire of liberty, wherever it can be embraced." He was lavish of explanations of France's pain at being obliged to resort to legislation foreign to her principles, but said she was forced to

follow a course she disapproved as long as England persisted in trying to dominate the seas. In other words, the French regretfully but firmly abandoned their championship of free ships, free goods. They made a concession in favor of American vessels, because of the treaty of 1778, but they revoked it when the Jay treaty was made public, protesting, as did Spain, at America's abandonment of her traditional principles.

France by promoting an armed neutrality tried to turn to advantage in 1794 as she had done in 1780 the indignation of the northern powers at British interference with their commerce. Denmark and Sweden willingly agreed to pledge support to the neutral code and the neutralization of the Baltic. Jay had been instructed to investigate the status of the movement when he arrived in Europe, and the willingness of Great Britain to sign the treaty was due in part to her desire to prevent the accession



of the United States. She also relaxed her policy as to provision-laden ships, and the attempted coalition came to nothing.

The establishment of the Directory meant the inauguration of a definite commercial policy, which was pursued unbroken through the period of Napoleon's domination. It was a mercantilist policy, and its spirit had found voice in the opposition to the treaty of 1786 and in the tariff reports. One of its mouthpieces, Ducher, actually held, or professed to hold, that the physiocrats and their followers were in the pay of Great Britain, which hoped to ruin France by inducing her to adopt a liberal commercial policy. All the efforts of the liberals to free the trade of the colonies met with opposition from Ducher and his party, who believed that even the abolition of duties between the colonies and the mother country would be placing the French merchant marine in Pitt's hands. The new policy manifested itself in two ways; one was in

attempting the destruction of English commerce, and in the pursuit of this aim France affronted the United States and allowed a state of undeclared war to continue for three years. The other side of the mercantilist policy, which was to fill the mind of the Corsican adventurer for nearly two decades, was inaugurated by the Directory before he came into power. Its aim was to weaken England by attacking her in the East, and to do this under the slogan, "freedom of the seas."

A little work widely read at the time, and recommended in the Assembly to all legislators, Arnould's *Système maritime et politique des Européens*, succinctly formulated the policy. Arnould was chief of the Bureau of Commerce, and his work warned his compatriots of the danger inherent in the overmastering naval power of Great Britain. Discussing the southward expansion of Russia, he worked out an eighteenth century version of the *Drang nach*

*Osten*, with rôles differently assigned. His argument was that if Russia should come to command the Black Sea and the Mediterranean, England, the exploiter of the bulk of Russian commerce, would be able to monopolize the Levant trade. The two powers would open up a new trade route by the rivers emptying into the Danube, and in order to do this would probably take Austria into their coalition. The commerce of Poland could be turned south along the Dniester, absorbing the grain of the north, and by their control of the Mediterranean and influence with the Barbary pirates the three powers could at will starve the rest of Europe. Through the Russian alliance with Persia, England would be able to navigate the Caspian, and by her control of the northern as well as of the Red Sea route, would hold the keys of trade with the Far East. In order to prevent the consummation of this London-to-Bagdad scheme, France must bolster up the power of the

Turk, in the hope of winning from him the right to overland trade with India, by means of which she might some day hope to destroy England's despotic rule in that country.

This was the theory upon which Napoleon acted when he told the Directory that France must strengthen the Turkish empire, and strike at England through Egypt. Upon it the Directory acted in authorizing the Egyptian expedition, by which France was to secure the "free and exclusive" use of the Red Sea. The British sea bogey was a convenient argument, and from this time forward "freedom of the seas" was an overworked slogan against England. "The French will no longer allow a power which seeks to base its prosperity on the misfortune of other nations, and to increase its commerce by the ruin of other peoples; which aspires to the sovereignty of the seas, desiring to introduce everywhere its own manufactures, but to receive nothing from

foreign industry, to enjoy any longer the fruits of its guilty speculations." With this argument, Frenchmen were urged to subscribe to the loan for the invasion of England, and Talleyrand wrote French consuls how France was setting about to free the seas for the cause of all humanity.

In carrying out these noble aims, the French government permitted itself extensions of belligerent right beyond any indulged in by Great Britain. The decree of July 2, 1796, announcing that henceforth France would treat neutral vessels as they allowed England to treat them, was followed in October by the authorization of interference with American commerce in the West Indies, and in the following March by a decree that neutral ships laden wholly or in part with enemy property were capturable. In successive decrees, property not provable as neutral was to be capturable under the American flag; all vessels carrying British goods were declared good prize;

American ships without a crew list were good prize; contraband was to include naval stores, and Americans taking a commission to serve against France were to be treated as pirates. This last provision was later extended to include all Americans found serving on British vessels; which meant that American seamen impressed by the British, if captured, were liable to that fate. It is not strange that Americans were not greatly impressed by France's "piratical mode of liberating the seas."

The situation was a difficult one for the United States, and a decision was reached to reverse her entire policy. In renewing the treaty of 1785 with Prussia, John Quincy Adams was instructed instead of continuing the support of liberal doctrines to give up advocacy of the abolition of privateering, to abandon as impractical the principle that free flag made free goods, and to recognize that naval stores were contraband. Adams protested against thus giving

up opposition to the "domineering policy of Great Britain," but in the course of the negotiations it seemed likely that the United States would be forced to declare war on France, and the government felt still more strongly that the attempt to defend neutral rights, apparently futile, would be a very costly one owing to the activities of French privateers and the impossibility of receiving justice from her notoriously ill-regulated courts.

Prussia objected to the abandonment of free flag, free goods, and refused to admit naval stores to be contraband; timber for shipbuilding being one of her important exports. However, the Prussian government recognized that under the circumstances there was little hope for recognition of the neutral code. The statement was inserted that as free flag, free goods had not been successful in practice, the signatories would be governed by the "generally recognized principles" of international law, but

that after the war they would co-operate to procure general adoption of a code to protect neutral commerce. The agreement not to commission privateers was also omitted, since the "pleasant theory" of abolition was difficult of realization.

The abandonment of the neutral code was more significant in this case than it had been in the Jay treaty, as in the latter it had been forced by Great Britain, while now it was forced on Prussia by the former victim of coercion.

Denmark and Sweden, as usual, suffered from Great Britain's practices. Denmark resorted to convoys, and had a violent controversy over Great Britain's refusal to respect the principle that a convoy exempts merchant vessels from search. Again, France made use of neutral indignation against England's extension of belligerent right, and in 1800, under the influence of Napoleon, the Czar Paul proposed to the two powers and to Prussia an armed neu-



trality to revive the principles of 1780 "and thus to ensure the freedom of the seas." This time the right of convoy was asserted in addition. The response of the British government was to lay an embargo on the vessels of the contracting parties in British ports, and order the seizure of the islands and property of Denmark and Sweden in the West Indies. Strong opinions on the subject were expressed in Parliament. Pitt maintained that Englishmen ought to shed the last drop of blood rather than yield the principles of the neutral code, and every shade of opinion was expressed, from the lofty one that England stood for the interests of Europe, which demanded that the same power should not be supreme both on sea and on land, to Lansdowne's conclusion that "his idea with regard to *liberum mare* resolved itself into this, that it had no connexion whatever with any question of law, but was altogether a question of power."

The collapse of the Armed Neutrality of

1800 was inevitable after the destruction of the Danish fleet by Nelson, and the assassination of the Czar Paul, whose successor had no enthusiasm for Napoleon and did have a sound respect for the British nation. He signed a convention with England, to which Denmark and Sweden later acceded, in which the principle of the free flag was not recognized, and which admitted the right of the warships of a belligerent, though not of his privateers, to search a convoyed fleet. On the whole, the advantages were with Great Britain, but the convention was criticized as yielding too much, for foodstuffs were declared not contraband, and the necessity for effectiveness in a blockade apparently recognized, although the substitution of a preposition for a conjunction allowed a loophole for a different interpretation. The United States had done nothing to support the Armed Neutrality, profiting by the advice of John Quincy Adams, who foresaw that France would be

the only country to profit much by it. She ended her three years of undeclared war with France by a peace which recognized the principles of the Armed Neutrality, and under Jefferson's administration entered upon what promised to be an era of peace and tranquillity. American trade was in a flourishing condition, in spite of British maritime policy, which was injuring the trade of England more than that of any other country. In fact, England signed the peace of Amiens in order to have an opportunity to rehabilitate her commerce. The British merchant had suddenly found himself without a place in the sun, while American merchants were sunning themselves in the market places where British goods had formerly held the monopoly.

But a great outcry arose when the treaty of Amiens was made public, for it contained no commercial provisions, and British conquests, which had been expected to develop into markets for British goods, were

handed back to France. Moreover, Napoleon did not remove the war duties in French ports. Englishmen observed with disquietude that he was taking steps to strengthen his hold upon Holland, Switzerland, and Italy, which would mean the closing of their markets to British commerce. Moreover, his activities in the new world were looked upon with suspicion. The British could not know that the failure to reduce San Domingo was to mean the abandonment of his grandiose scheme for making Louisiana the center of a great and exclusive colonial trade, and they heard with anxiety of the departure of huge French fleets, and discussed the possibilities of a commercial war after the war. Suspicion was rife that Napoleon meant the peace to last only until France had a sufficient navy to secure "that which she called the freedom of the seas, but which would be in fact the annihilation of the commerce of Great Britain." In short, there was a feeling that,

as Sheridan put it, Napoleon might be planning to carry off British credit, capital, and commerce, "like so many busts and marbles." But it took the Corsican's diplomatic activities in the Orient, and his attempts to establish good relations with Russia, to bring about the excitement which demanded the re-opening of the war: a consummation for which Napoleon had done much judicious planning.

The second phase of the struggle with France was marked by a still greater confusion as to neutral and belligerent rights. It was well known that Americans were carrying French colonial products to the United States, to avoid capture, and transshipping them to European ports. Great was the rejoicing, therefore, when what James Stephen described tellingly as "the fraud of the neutral flags" was attacked by the famous decision of the British Admiralty in the *Essex* case, that touching at a neutral port did not break the voyage,

and that therefore the cargo was forfeited according to the doctrine of continuous voyage. Great numbers of American ships were removed from what freedom there was upon the seas to the snug but unprofitable seclusion of British ports. Great dissatisfaction was expressed with the decision, which to modern eyes seems to have been a just one, if the doctrine of continuous voyage is accepted. Indeed, the decisions of the High Court of Admiralty, after the appointment in 1798 of Sir William Scott, later Lord Stowell, maintained a very high standard. This was not the case with the local courts, or with the decisions of his predecessor, Sir James Marriott, who is said to have declared in one case that England by her position formed a natural blockade of the continent, and must use the advantage given her by Providence. In his day there was probably some justice in the saying of John Quincy Adams that the English admiralty courts seemed to be gov-

erned solely by the code that was Great Britain's only guide in maritime affairs: "Rule Britannia, rule the waves." Feeling in America was at high pitch over the *Essex* decision; the slogan, "free ships, free goods" was brought out of its recently-acquired obscurity, and Jefferson nervously faced the possibility of being forced into war.

The events of the present war have revived interest in the competition in the extension of belligerent right which France and England began in 1806. To England's blockade of Prussian ports Napoleon replied with his famous Berlin decree, which declared the British Isles blockaded on the grounds of Great Britain's failure to conform to international law as recognized by civilized nations, her war on commerce, her capture of neutral property and her proclamation of paper blockades with the intent of ruining the commerce of the world for her own advantage. Great Britain riposted

by an Order in Council cutting off commerce with France. Napoleon's counterthrust was to declare good prize all vessels that conformed with Great Britain's regulations. Later Great Britain forbade all trade in commodities produced or manufactured in France, except under license. The situation produced by this system would have been absolutely intolerable had it not been for the anomalous system of providing by licenses for the evasion of this thorough-going policy of strangulation. As it was, this legalized smuggling, with the illegal smuggling that accompanied it, assumed incredible proportions.





## VII

### INTERNATIONAL EX- PERIMENTS

**"If the freedom of the sea is abridged by compact for any new purpose, the example may lead to other changes. And if its operation (search) is extended to a time of peace as well as of war, a new system will be commenced for the dominion of the sea."**

***James Monroe.***



## VII

### INTERNATIONAL EXPERIMENTS

**I**N establishing by the Orders in Council the system of cutting off trade with France, British ministers had in view, not alone the strangling of the enemy, but also the striking of a blow at what seemed to them the undue expansion of American commerce. The fact appears in the correspondence of Canning and Perceval, and it leaked out in the parliamentary debates of 1812. However, the official defense of the measures was that they were "defensive retaliation" against the measures of France. Those measures were equally disturbing to trade; and against the assumption of both

governments that "neutral commerce depends solely upon the toleration of belligerents," the United States in her turn resorted to measures of commercial restriction in the only way that Jefferson believed them justifiable: as a substitute for war. When the economic weapons of embargo and non-intercourse seemed to Americans to have proved unavailing and they resorted to war in 1812, they fought England rather than France, partly because of the shifty diplomacy of Napoleon, partly because of party conditions and American indignation on the subject of impressment.

Since the agitation of British merchants and manufacturers injured by the British system had secured the withdrawal of the obnoxious Orders before our declaration of war, although too late for the news to reach America, impressment remained the only genuine *casus belli*; for the Americans would scarcely have fought over the theory of blockade when the British had sus-

pended their practice. The American theory of search was that the belligerent right of search extended only to the ascertainment of the nationality and destination of the vessel and the possibility of contraband goods being on board. The complaints against the British policy of extending search to the mustering of the crew and the seizure of seamen claimed as British subjects dated back to the early days of our independence. They were not aimed at the doctrine of indefeasible allegiance, but at the presumption of Great Britain that she had a right to enforce her municipal law upon non-British vessels on the high seas. Liberal thinkers in England disapproved of the national policy in this respect, but there seemed little likelihood that the policy would be altered. The whole system of the press gang was open to criticism, but ministers emphasized the necessity of securing sailors to man the fleets, and declared that impressment was "a right upon which the naval

strength of the empire mainly depends." On the other hand, the mood of Americans who regarded England as "a tyrant pretending to exclusive dominion upon the ocean" was expressed by John Quincy Adams to Madame de Staël: "As long as they felt a *necessity* to fight for the practice of stealing men from American merchant vessels on the high seas we should feel the *necessity* of fighting against it."

However, both sides were soon weary of the fighting. Great Britain was embarrassed by the too evident interest taken in the war by the Czar. His offer of mediation in a conflict which had been caused by extensions of belligerent right was too reminiscent of 1780 and 1800 to be pleasing to a government which had no more intention of yielding its contention as to the limitations of neutral right than on former occasions. The British assumption was that the matter was a kind of family quarrel, in which no outside intervention could be

tolerated, and the government took steps to negotiate a peace in which the question of maritime right could discreetly be avoided. Such a peace, after tedious negotiations, was signed at Ghent, and the British foreign office was free to give its entire attention to settling the affairs of Europe at the Congress of Vienna.

John Quincy Adams was more correct than usual in his prophecies when he declared that the main accomplishment of the Congress of Vienna would be the sowing of the seeds of future wars. A large body of opinion was more optimistic. Many people, especially in England, hoped that burning international questions would be so settled as to make a reduction of armaments possible, and render wars, if not impossible, at least far less frequent. Nor was there lack of paying material in the way of good intentions. It is well known that the erratic Czar Alexander I meant that the gathering should be marked by the formation of



some kind of league of nations. In the course of his career, his ideas on this subject ranged over a wide field, including mystical notions of a body possessing not merely supernational but truly supernatural powers, and finally dwindling to the sordid league to prevent the spread of liberal views into which the Holy Alliance finally degenerated. The scheme he had submitted to Pitt in 1804 went to neither extreme, for dismissing perpetual peace as a mere dream, it proposed a league which would guarantee national rights, assure the privilege of neutrality, delay war until mediation had proved unavailing, and punish breaches of international law. The part of the plan that had to do with neutrality did not impress Pitt, engaged as he was in a maritime war which took no account of neutral rights, but as a means of guarantee against territorial aggressions a league of nations approved itself to him and to his successors.

Such a league Castlereagh was instructed

to further in 1814 at Vienna. One of its bulwarks was to be, in accordance with the British principle of keeping the Netherlands out of the hands of a great power, the restriction of France's maritime power by her exclusion from Antwerp and the Scheldt. Although there were general hopes in England of arrangements that would mean a lasting peace, the only popular mandate to the British representative was that he see that steps be taken to abolish the slave trade. The fight in England to end that terrible traffic had been a long crusade against interest and prejudice, and one of the arguments in its favor had been that it was a nursery for seamen. Having made the traffic illegal for Englishmen, the nation was determined that the seas be freed entirely from this shame.

With England's efforts confined to measures against the slave trade and the establishment of "security for the future" while her allies sought "indemnity for the

past," the Congress, as all the world knows, made its settlement on the ancient principle of bartering about peoples as pawns in a game, the noble aims of Alexander surviving in the sounding but empty phrases of the Holy Alliance. English influence prevented the discussion of the burning question of maritime rights, but the principle of freedom of navigation on international rivers was recognized in the arrangements for the Rhine, and the Congress advised that the principle be extended to all international streams. A pledge was given for co-operation for the eventual abolition of the slave trade, but further concessions were necessary if the abolition was to be made effective.

Such a concession Great Britain unsuccessfully sought at the Congress of Aix-la-Chapelle, called in 1818 in accordance with the idea of international guarantee which had survived the Congress of Vienna. It involved the recognition of a mutual right

to search vessels in time of peace. British statesmen took pride in the thought that it was the nation whose flag had always floated proudly on the seas of the world which in the cause of humanity was willing to take the lead in yielding the right of search of its vessels in time of peace, but the other powers looked with suspicion at the bearer of gifts thus hall-marked, fearing that England had ulterior motives. As a matter of fact, since it was British ships that did the greater part of the work of policing the seas, British ships would be much more frequently the searchers than the searched. The Czar, always ready to contribute his mite toward an international settlement, proposed that the work be done by an international police force, but it was not considered prudent to encourage the appearance of Russian vessels so far from home as the African coast.

A similar difficulty arose in connection with England's proposal for the suppres-

sion of the Barbary pirates. Unkind things had been said for generations about Great Britain's lack of interest in making the Mediterranean safe for commerce by suppressing these pests, from whom she and the other great powers bought immunity, but who prevented their weaker rivals from getting any considerable share of the Levant trade. Sir Sidney Smith had formed an order of knighthood for work for the suppression of the evil, and maintained a lobby at the Congress of Vienna, but he had been unable to get any hearing. Americans are wont to feel pride in the knowledge that it was the achievements of America's infant navy which first demonstrated that force could win from the pirates better satisfaction than tribute could, and they are probably entitled to feel additional satisfaction in the thought that it was following American successes that Great Britain proposed to the European concert that Mediterranean piracy be suppressed. Again the idea

of an international police in which Russian ships would figure and which Great Britain would be likely to control was regarded with marked lack of enthusiasm, and the pirate question was left to be dealt with by individual action.

The question of the Spanish colonies was also broached at Aix-la-Chapelle. Spain was still holding to her theory of colonial monopoly, having, indeed, little but the theory to which to cling. She had made a concession on the point of monopoly of the western seas in the Nootka Sound convention in 1790, when she had agreed not to interrupt the trade of the English on Pacific coasts not occupied by her, while the English in return had promised not to engage in navigating or fishing within ten leagues of the coasts actually occupied by Spain. Such an agreement was convenient and practical, but it involved recognition of exclusive rights of a nation outside the modern conception of territorial waters.

which had come to be considered as measured by a cannon shot, and estimated as three miles.\*

The system of trade restrictions against which the American colonies had revolted in 1776 was still theoretically the system of Spain, although in 1798 she opened certain ports under restrictions, and against it and other features of Spanish policy her colonies had begun to revolt in 1809. The movement appealed to liberal opinion in Great Britain; it also appealed to business opinion, for British merchants promptly took advantage of the opportunity to trade with the revolted colonies. Consequently at Aix-la-Chapelle, the British representative turned a deaf ear to the proposals of France and Russia to help Spanish sovereignty by means of a trade boycott of the powers, including, if possible, the United States.

\* Jefferson proposed the Gulf Stream as the "natural boundary" of American territorial waters.

Shortly after the war of 1812, the United States made a general offer to repeal discriminating tonnage duties in favor of any nation that would give her reciprocal treatment. The Netherlands, Prussia, and Sweden accepted the offer, as did Great Britain, but her action was restricted to her European ports. In the same agreement, she admitted the Americans to trade with the British possession in India. But she refused to admit them to her West Indian trade. Only a few months after assuring John Quincy Adams that England had no intention of altering her colonial system in that respect, Canning told him that all England desired was to persuade Spain to grant a "*liberal* commercial intercourse between her colonies and other nations, similar to that which we allow in our possessions in India." Adams was a good diplomat, and it was not until two years later that he made the obvious retort, that England in pursuing her "compromise between legitimacy



and profit" would find that her suggestions had more weight if she applied this liberal policy to all her own colonies. His remarks had more weight at this time, because continued exclusion from West Indian markets had led the United States to the policy of retaliation in kind, which was keenly felt by British merchants. The closing of American ports to British vessels in the West India trade was an argument which led to the conditional opening of certain ports to Americans in 1822.

In 1822, a final but ill-fated attempt was made to induce the concert of Europe to emit harmonious sounds with the Holy Alliance wielding the baton. The Congress of Verona had on its programme several items relating to maritime affairs. One was the ukase of the Czar issued the preceding year which reserved commerce, whaling, and fishing in the region between Bering Straits and the fifty-first parallel to Russian subjects, and forbade foreign vessels to ap-

proach within one hundred miles of the coast. Against this application of the doctrine of *mare clausum* to Bering Sea, both the United States and Great Britain had protested. The measures to be taken to end the slave trade were still unsettled, and the Greek insurrection had raised questions of blockade and other belligerent rights.

But the most important question before the Congress was that of the revolted colonies of Spain. Too late, the home government promised liberal commercial arrangements with her colonies to the European powers if they would help restore her sovereignty. Matters had become extremely complicated in Latin American waters. The Spaniards had proclaimed a paper blockade of Venezuela, and they also declared that for the vessels of any nation to approach any port on the Spanish main was a breach of the colonial monopoly. The commerce of the United States and Great Britain suffered most by the situation, as

those nations carried on the bulk of commerce in those waters. The United States had recognized the belligerents, and American commanders had orders to protect the ships of all nations in the waters about Cuba, against the action of pirates and of the Spanish privateers, who, ostensibly enforcing the Spanish monopoly, or the blockade, were indulging in practices indistinguishable from those of pirates. The international complications resulting from incidents in the Caribbean were skillfully handled by Adams, who saw a great future for a line of friendly republics in the new world. Great Britain too had no interest in the restoration of the old order. The interference with her commerce in the new world made the recognition of the new republics in line with her business interests. At Verona she informed the Powers that the depredations of the pirates would force her to the act of recognition. In fact, the policy of the Holy Alliance offered none of the

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solid advantages held out by championship of the popular principle which to-day goes under the name of self-determination, and Great Britain withdrew from the Concert of Europe and proceeded to call the new world into being to redress the balance of the old. It was the skill of Adams that so framed the new world's answer as to establish a new line of demarcation, which sealed the fate of the old colonial system by laying a ban on its further extension in the new world.

The Congress of Verona had no signal success in dealing with the subject of suppressing the slave trade. Great Britain proposed that each nation denounce it as piracy; that steps be taken to prevent the use of national flags by foreigners plying the traffic; and that colonial products of states that allowed the slave trade be barred by the contracting powers. These measures did not recommend themselves to the Con-

gress, and it contented itself with a general statement of disapproval of the traffic.

In the meantime, England tried to secure the co-operation of America. The method which appealed to the English as the most effective for dealing with the problem was an international agreement for a mutual and limited right of search. But the right of search was connected in the minds of Americans with impressment and with the war of 1812; moreover, they looked with suspicion on the movement as an attempt by Great Britain to secure recognition of a special right to police the high seas. Still another objection was that Americans would by the proposed procedure be exposed to the jurisdiction of tribunals wholly or partly foreign. America approved of making the traffic piracy by the law of nations, but Great Britain insisted that this would imply the right of search. Politics and the sensitiveness of the slave states prevented effective action for a term of years,

during which the trade came to be plied to an increasing extent under the American flag. Great Britain in 1841 secured the agreement of France, Russia, Austria, and Prussia to a mutual right of search, but the United States would not yield.

Our representative in France, Lewis Cass, without authorization from his government intimated that we were prepared to fight against any such pretensions. The government failed to disavow this appeal to France, "an old ally of the United States and a distinguished champion of liberty of the seas." Much stress was laid upon the fact that England had never abandoned her claim to the right to search vessels for her subjects on the high seas. However, the British special representative in Washington, Lord Ashburton, while refusing to disclaim the right, stated parenthetically that the practice had ceased and could not be renewed under the reformed regulations for manning the British navy, which had

by that time abandoned the custom of seizing seamen either at home or abroad. This statement improved the situation somewhat. England maintained her right to ascertain the genuineness of a flag, and made a distinction between *search*, which she admitted was purely a belligerent right, and *visit*, for the purpose of ascertaining the genuineness of a flag. We refused to admit this distinction. There was no doubt that many slavers protected themselves by flying the Stars and Stripes, and our naval vessels were doing little to prevent this.

But we stood proudly by the position of guardian of the freedom of the seas against any claim of special police power by a single nation. Finally, in the Webster-Ashburton treaty, an agreement was made for a joint police by the vessels of both nations. After the beginning, the United States did not carry out her part of the arrangement. It would be unfair to judge the practicability of an international police of the sea by the

failure of this arrangement, because the attitude of the slave states hampered all efforts to deal effectively with the situation. The British government continued to protest and the slave trade, under the stars and stripes, continued to increase. The English admitted they had no right to search vessels bearing the American flag, however strong the suspicion attaching to them, but the satisfaction attached to this acknowledgment of the legal status of search was outweighed by the consciousness of the correctness of the accusation that we were allowing our flag to protect criminals. The outbreak of the Civil War freed the hands of our government, and arrangements were promptly made for a mutual right of search, and for mixed courts for the trial of the slavers.





## VIII

### FREE TRADE, FREE SHIPS, FREE GOODS

**“ Le système coloniale que nous avons vu est fini pour nous, il l'est pour tout le continent de l'Europe; nous devons y renoncer et nous rabattre sur la libre navigation des mers et l'entière liberté d'un échange universel.”**

*Napoleon, 1816.*



## VIII

### FREE TRADE, FREE SHIPS, FREE GOODS

**N**APOLEON, meditating at St. Helena, came to the conclusion that the old colonial system had been a failure, and that free seas and free trade were the watchwords of the future. Unfortunately, the manufacturers who had grown powerful under his restrictive system were able to prevent France from sharing in the benefits of progress. But the British people in the period of trade depression that followed the great wars, came to see that the system of restrictions that had so long been regarded as the bulwark of British prosperity might perhaps have

outlived whatever usefulness it may have possessed. These suspicions were expressed in Parliament in 1817 by one of the most brilliant politicians of the day. Brougham made an eloquent speech in which he attributed the existing hard times to the restrictive commercial system. He showed that certain protective measures recently adopted had been injurious in their effects, and he argued that with the possible exception of the Corn Laws, which tended to make the nation independent in a vital necessity of life, all restrictions were distinctly harmful. The Navigation Laws he attacked vigorously: perhaps they had in their day been useful in getting trade away from the Dutch, but now they were inspiring retaliatory measures from America, and as a result of the system of which they were the mainstay Russia, Prussia, Spain and Austria shut their doors to British trade. The vice-president of the Board of Trade said Brougham was right, but that the protected

interests would prevent the abandonment of the vicious system. In 1818, an object lesson was provided by the American exclusive measures which forced the free port act.

Two years later, in connection with discussion of the trade with Latin America, Canning declared, as Shelburne had done in 1793, "Let trade be open, competition, enterprise, capital, would ensure her due share of advantage to this country." But such an observation would have left the question an academic one had not the people most concerned taken a hand. That same year Parliament received a petition from London merchants which pointed out that other countries were establishing tariff barriers which they justified by the prosperity of England under a restrictive policy. The merchants suggested that the adoption of "a more enlightened and conciliatory system by England would be the best means of allaying the commercial hostility of other

nations." Among other steps in this direction, proposed by Alexander Baring, the mercantile authority who presented the petition, was the repeal of some duties, the abolition of prohibitions, and the abolition of the Navigation Acts. Again the vice-president of the Board of Trade said the theory was good but the practice impossible, and that as to the Navigation Acts, they were sacred. However, the wedge had been inserted by the conversion of the merchants. The matter would not down. It was suggested in one debate that as Great Britain no longer had the undivided empire of the sea, she must be content with a fair system of competition, and that she might well begin by a simplification of the some two thousand laws which complicated the working of the Navigation Acts. One objection to any innovations in the commercial system was the one that had been used against the treaty of 1786 with France: that it would mean the development of commerce

in Europe in place of overseas commerce, and that this, by the substitution of short voyages for long ones, would destroy the "nursery for seamen." The conservative members made appeals to cling to the Navigation Acts, "the sheet anchor of our greatness and glory," and argued that however advisable any change in the system might be, it would not be expedient until all nations adopted it. By 1822 the vice-president of the Board of Trade had changed his views, and pointed out that the sacred system as a matter of fact was no longer entirely intact, and that it might as well at least be made consistent. When the conservative Lord Liverpool said that "the doctrine was no longer maintained, that to bind the trade of other countries was advantageous to our own," it was clear that times had changed indeed and that the old system was doomed.

The President of the Board of Trade under Liverpool was Huskisson, no theorist,



but a man who dealt with cases as they arose. He saw the direction in which the world was tending, and meant to keep Great Britain in the front rank. In 1822, he followed the policy outlined by Canning three years before, and suspended the Navigation Acts for Latin America, as they had been for the United States and for the Portuguese colonies: that is, they were allowed to bring their produce into Great Britain under their own flags. He also allowed a number of articles to be exported from non-British ports in Europe into the British colonies, provided they were brought in British vessels. In 1825, he proposed opening the colonial trade fully to friendly states, under certain limitations, but preserving the principle, later to be enshrined in American policy, that all trade between the colonies and the mother country was a coasting trade, and thus to be reserved for British bottoms. But Americans were not satisfied with the concessions of 1822. Be-

lieving that the arrangements discriminated against them, American merchants exerted their influence to secure discriminating duties on British vessels bringing West Indian goods to the United States. In 1825, Parliament, irritated at this behavior, authorized the closing of colonial ports to American vessels until the discriminations should be removed. The fact that Americans were carrying on some of the trade between Canada and the West Indies also produced irritation. But the discriminating duties were withdrawn by the new administration in 1830, and commerce was resumed.

✓ || A Prussian order in 1822 laid discriminating port duties on vessels of countries that did not admit Prussian ships on principles of reciprocity, and gave notice that this would be followed by discriminatory duties on goods. The Prussian government explained the act as a measure of protection to Prussian shipping, copied after English

policy. This procedure led to a reciprocity treaty, and brought Huskisson to the conclusion that England was at the parting of the ways, and must choose between a war of duties and prohibitions, and a general policy of reciprocity in shipping matters. He recommended the latter as likely to lead to better international relations, and also to the actual benefit of British shipping, as England's great rival, America, was now an important factor in international trade. Huskisson's advice was followed, and the result was a long series of reciprocity treaties. Huskisson also attributed some of the business difficulties of the time to over-protection, and brought about some reductions in duties which brought forth wails from manufacturers. Between 1830 and 1840, two Europeans, an Englishman and a German, visited the United States, and on their return to Europe each used America as a text to advise his own country to adopt a different economic policy. Fred-

erick List, believing that the theory of free trade was the policy ultimately desirable for every state, thought that it was advisable for a nation during its period of development to adopt a system of protection in order to acquire the wealth and prosperity which would make it in time able to afford the luxury of free trade. He aided the protectionist movement while in this country, and provided in Germany the theoretical basis for nationalistic protectionism which has ever since been the backbone of her policy.

Richard Cobden saw in America what she was to become, a great industrial nation reaching out with her commerce into all parts of the world. Englishmen of earlier generations turned their minds to the crushing of this potential rival or at least stunting her growth. To Cobden, who believed in the healthfulness of competition, the right course was to make England ready for the struggle, in order that in a fair field

she might prove herself the superior of her younger competitor. But as he pointed out, England was heavily handicapped in two ways: by her policy as self-constituted guardian of the balance of power in Europe, and by the system of restrictions which hampered her trade. The British gospel according to Cobden, was for Great Britain to keep out of Continental bickerings, and to free her trade from all restrictions. He was a frightful iconoclast, and attacked many shrines of British devotion. He inquired where lay the equity in forcing nations at the cannon's mouth to open up their trade. He pointed out that it was not by divine right that Great Britain held Gibraltar; in his thought the strong places commanding the entrances to closed seas ought to be held by a European league. He believed that government should apply its energies to home affairs, and let commerce spread in foreign countries and do the work of maintaining good relations. The policy

of America seemed to him a model one in this respect.

Unsuccessful in converting ministers to his foreign policy, it was in conversion of England to free trade that Cobden had his great success. The movement in that direction was already under way. Labouchère had succeeded in obtaining the abolition of prohibitions in the colonies in 1841, and in 1845, after debates extending over five years, the differential duties on sugar were abolished, with the result that sugar consumption in Great Britain was greatly increased. Peel secured the abolition of a number of duties and prohibitions between 1843 and 1846. But the greatest single step was the repeal of the Corn Laws, successfully engineered by Cobden and Bright. The free trade movement was successful because the idealists who looked to the movement as a step toward a world order of peace and prosperity had the help of business interests that saw the prospect of better

business in the change. The repeal of the Corn Laws converted the English people to the theory of free trade, and its complete establishment was only a matter of time.

In the meantime, the finishing strokes were being given to the Navigation Acts. Prussia, in return for a most favored nation clause, was admitted to the British colonial trade. In 1838 Austria was given most favored treatment in the East Indian trade. Two years later treaties were made with the *Zollverein*, the Hanse, and with other German towns. The Navigation Laws were again modified in 1847, but they were still inconsistent.

In 1847 the United States proposed a reciprocal arrangement which was interpreted as an offer to open the American coasting trade, but although Gladstone seconded the proposal, it was not accepted. Two years later, Great Britain offered to open her colonial ports to the United States. The repeal of the last of

the Navigation Laws was forced by the interest of Canada, whose trade was suffering as a result of the abandonment of preferential duties.

When in 1854 it became evident that the bogey of Russian expansion was likely to lead to war with Russia, the representatives of the great industrial centers, London and Manchester, began to ply ministers with questions as to what position the country was prepared to assume in time of war on the subject of neutral rights. It was pointed out that there was little Russian property afloat, but great quantities of British property; that an arrangement with the United States to recognize that free flags made free goods would anticipate any sympathy being shown by her to Russia, which had been the traditional champion of that principle. Great Britain would gain rather than lose by such an arrangement, especially as the geographical position of Russia would make the right to capture her



goods on neutral ships of little value. There was also a definite advocacy of the abolition of privateering, from the fear that American vessels might be used as privateers by Russia unless her sympathies were engaged on the other side. Considerations of political expediency also dictated that Great Britain alter her usual policy. France, her ally, sometimes recognized the immunity of enemy goods under a neutral flag, sometimes went back to her old doctrine of hostile infection, which rendered liable to capture neutral goods on enemy ships and neutral ships carrying enemy goods. It was desirable that the practice of the allies should be uniform, and a compromise was agreed upon. The United States proposed to all belligerents that the immunity of neutral goods on enemy ships and of enemy goods on neutral ships be recognized, and Prussia, who was interested in operations against commerce in the Baltic, proposed also that privateering be

abolished. The suggestions were adopted as the procedure for the war.

When the Treaty of Paris was made at the end of the Crimean war, an interesting application of the French doctrine of freedom of the seas through immunity from warlike operations was made in the decision to neutralize the Black Sea. This was done, however, purely for the purpose of weakening Russia with relation to Turkey, and was accepted by Russia only as part of a dictated peace which she would repudiate as soon as opportunity allowed. The provision ran that the Black Sea was to be open to the mercantile marine of every nation but in perpetuity interdicted to a flag of war. As the Turk was keeper of the gate, and could at her discretion admit ships of war in an emergency, the advantage was decidedly on her side. The war was really prolonged a year in order to put the allies in a position to dictate these terms, which were criticized by far-seeing men in Eng-

land as sowing the seeds of future trouble. When the regular work of the Congress was over, the French representative announced that it was suitable that the Congress go on record as having achieved something notable for the advancement of humanity. He thereupon submitted a brief declaration, that international maritime law being so uncertain that disputes continually arose in time of war as to the respective rights of belligerents and neutrals, the signatory powers would seek to introduce the fixed principles that follow that privateering was abolished, that enemy goods should be immune on neutral ships and neutral goods on enemy ships, contraband of war always excepted. Blockades to be binding must be effective. Other powers were invited to accede, and all the leading nations did so except Spain and the United States. President Pierce, in his message explaining to the United States our refusal, pointed out that the United States had proposed at

Paris the recognition of the immunity of all private property at sea, but that unless that were recognized, the United States could not agree to abolish privateering, since, as long as war upon commerce was allowed, the United States, not having a large navy, must depend upon privateers as auxiliaries.

Although failing to co-operate for the defense of neutral rights, the United States was at this time working for another form of freedom of the seas. She was carrying on a campaign against the Danish tolls for the Baltic, maintaining that they implied recognition that a single nation had the right "to treat one of the great maritime highways of nations as a close sea." President Pierce took the stand that it was an American policy "to maintain the freedom of the seas and of the great natural channels of navigation." In 1859 she won her point, and the dues were abolished.

Although the powers at Paris refused to

recognize the immunity of private property, Lord Palmerston in a speech to British ship-owners in 1856 stated that he hoped that would be the next step taken for the humanization of war. This was regarded as of good omen by shipping interests, which drew the attention of Parliament to the tendency of commerce at the outbreak of a war to seek neutral bottoms in order to be immune, and argued that the adoption of the American doctrine, which would put ships on the same footing as their cargo, would tend to preserve commerce for the British flag. It was pointed out that in order to be effective this change must involve the abolition of blockade and contraband. Objection to the further weakening of British power by the further limitations of belligerent right prevented this movement gaining headway, and none took up the proposal of one member that maritime law be revised by an international congress whose members would work to promote, not

national interests, but "the general welfare of mankind and the progress of humanity." Those fearful of the loss of British naval supremacy comforted themselves with the thought that in case of war British naval commanders would not allow themselves to be hampered by the Declaration of Paris. When the question was debated in 1862, Lord Palmerston had changed his opinion about the next step, and Disraeli maintained that the concessions made at Paris must be withdrawn.



## IX

# THE LAW OF THE SEA YESTERDAY

"We declare without hesitation that the right of the neutral to security of navigation on the high seas ought to take precedence of the transitory right of the belligerent to employ these seas as the scene of the operations of war."

*Sir Ernest Satow.*

"If all materials are prohibited out of which something may be made which is fit for war, the catalogue of contraband goods will be immense, for there is hardly any kind of material, out of which something at least, fit for war, may not be fabricated. The interdiction of these amounts to a total prohibition of commerce, and might as well be so expressed and understood."

*Bynkershoek.*





## IX

### THE LAW OF THE SEA YESTERDAY

**T**HE Declaration of Paris was the high water mark of the limitation of belligerent right. This was due in part to the policy of the United States. At the outbreak of the Civil War, indeed, our government offered to accede to the Declaration of Paris. Great Britain, shrewdly suspecting that the offer was made in order that the privateers of the South should not be recognized, insisted on a clause excepting the existing circumstances, and our government accordingly withdrew its offer. We did not, however, issue letters of marque, although Congress authorized the president to do so. At the beginning

of the war, the Confederacy supplied its lack of a navy by commissioning privateers, but to avoid difficulties as to their status adopted them into her regular forces, as naval vessels.

It was by the decisions of our courts that we departed from our traditional attitude and furnished new arguments for the criticism of national prize courts, as likely to favor the belligerent against the neutral. In connection with the blockade of the Confederate ports, federal vessels captured neutral vessels carrying goods to neutral ports such as Nassau, and they were condemned by the application to blockade of our country's ancient *bête noir*, the doctrine of continuous voyage; not merely by the doctrine as originally applied by England, but by a novel extension of it. According to the British usage, the capture had not been recognized before the second stage of the voyage was entered upon, but by several decisions, notably in the famous case

of the *Springbok*, captures were adjudged fair when made in the first stage of the voyage, on the presumption that the goods were to be carried from the neutral port, in the same or another vessel, to one of the Confederate ports. This decision was severely criticized, especially by continental powers, but Great Britain did not seriously protest at the application of principles which so fitted in with the ancient claims of the ruler of the seas. As the decision endangered voyages between two neutral ports and allowed the operations of a blockade to be extended to all parts of the high seas, it was felt in many quarters to be highly destructive of the freedom of the seas. Whatever the merits or demerits of this famous decision, it put the United States on the side of extension of belligerent right, and our own arguments were turned against us in the late war, our doctrine proving very convenient to Great Britain.

The United States also sanctioned the

extension of contraband. In 1862 coin and bullion were added to our contraband list, and decisions of our courts recognized its extension to articles not hitherto regarded as necessary in war, such as printing presses. On the contrary Great Britain, no longer able to feed her population from home supplies, was tending toward the abandonment of her old position that food-stuffs were contraband.

Our famous application of the doctrine of contraband to the persons of Mason and Slidell was taken by Europeans as another indication that the days of American championship of neutral right were gone forever. Continental authorities, when appealed to, pronounced the capture incompatible with freedom of the seas. The claim of Great Britain was based on the argument by which we had formerly attacked impressment, and we had the satisfaction, when we yielded, of congratulating the English upon defending an ancient American principle.

The incident may be regarded as closing the long controversy between the two countries as to the belligerent right of search, but in connection with the facility of Americans in abandoning theories in favor of more tangible considerations, it will be necessary to take up the recrudescence of the question of search in time of peace that took place in the Bering Sea controversy. In 1886 and 1887 British sealers were captured in Bering Sea outside territorial waters and condemned in the federal court at Sitka on the ground that Bering Sea was *mare clausum*. It will be remembered that the United States had protested against the Russian claim to that effect in 1821. After various positions had been taken by our government in answer to the British protest Secretary Blaine disclaimed the *mare clausum* argument and the matter was submitted to arbitration. The British were able to adduce the American stand against the exercise of municipal jurisdiction on the high

seas in the case of impressment and of the slave trade. One of the American lawyers claimed that the freedom of the sea was only for innocent and inoffensive use, not for the invasion of national interests, which our government claimed were affected by pelagic sealing, and that the United States had only exercised on the high seas the right of self-defense. He rehearsed the history of *mare liberum* from this point of view, and claimed that the right of search was not a purely belligerent right. This afforded the British representative an opportunity to take a high and perfectly well-grounded position from the point of international law. The United States, having laid itself open to the charge of attempting to usurp "special privileges and special powers" on the high seas, took refuge in the position that if international law did not recognize the right of the inhabitants of the deep to protection it ought to do so. Since the decision was made upon legal and not

moral grounds it inevitably went against the United States. The shifting grounds upon which the American claims were based, and the change in the American attitude toward search when we had interests to defend by its exercise, justly laid us open to criticism, but after a certain amount of journalistic jubilation our British cousins charitably allowed dust to gather upon the memory of our peccadillo. It is not uninteresting to recall that the president of the tribunal spoke of the regulation of pelagic sealing which was part of its work as "a first attempt at a sharing of the products of the ocean, which has hitherto been divided." The regulations were ineffective, but as controversies still arise over fisheries it is not impossible that an international jurisdiction on the ocean may some day provide the protection whose absence our representatives deplored.

At the outbreak of the Spanish war the United States declared that she would be



governed by the principles of the Declaration of Paris. Spain reserved the right to issue letters of marque, but instead she organized an auxiliary service after the method initiated by Prussia in 1870. Questions which arose during that war as to the conversion of merchant vessels into warship; the treatment of enemy vessels on the outbreak of war; as well as blockade and contraband, brought home forcibly the differences in principle between maritime law as interpreted by different countries.

The hope for some general agreement on these points as well as upon the use of new devices in warfare, gave warmth to the welcome of the Czar's proposal which brought about the first Hague conference. It is important to remember that in the two Hague conferences two irreconcilable forces were at work. One was the belief in the possibility of co-operation between nations that would make wars less frequent; the other was the preoccupation with war itself:

the desire to avoid the surrender of any practice which in case of war might give advantage to the enemy. Andrew D. White expressed this somewhat ruefully when referring to his colleague, Captain Mahan: "When he speaks, the millennium fades, and this stern, severe, actual world appears."

The advocacy of the immunity of private property at sea had come to be regarded as especially an American doctrine, and the illustration provided by the work of Confederate cruisers of what commerce-destroying meant under modern conditions had strengthened its hold on the popular mind. In 1871 the principle was recognized in a treaty with Italy. On the other hand, the American navy had grown to be a formidable institution, and it was well known that naval opinion was against the doctrine; in fact, Captain Mahan was publicly on record against it. However, Mr. White made an eloquent appeal that the doctrine be dis-

cussed, but it was ruled to be beyond the competence of the conference. The desire for agreement as to the rights and duties of neutrals was dismissed, as well, with the recommendation that the two questions be taken up at a future conference.

Naval men in Great Britain were greatly exercised lest the British navy should be hampered in case of war. Certain disadvantages of the existing system, or lack of it, were apparent during the Boer war, and in 1900 Mr. Gibson Bowles made them the text of a speech in the House of Commons. Pointing out the importance of sea power; the fact that two-thirds of the world's trade was carried by sea, and that the power in control of the sea was in a position practically to stop the supplies of the enemy, he lamented that since the Declaration of Paris the navy could no longer be used except for defense. The Russo-Japanese war provided an illustration of the unsatisfactory state of affairs, and the necessity

of a better international understanding was mentioned by John Hay in the message which proposed the calling of a second Hague conference.

At the second conference a very strong plea for the immunity of private property was made by the American delegate, Mr. Choate. The chief opposition to the proposal came from Great Britain, Japan, Russia and France. Germany made the important point that the question was closely connected with the rules for contraband and blockade. Russia believed that the fear of loss on the part of commercial interests was an important deterrent from war. Great Britain professed readiness to consider the subject if it was to mean the reduction of armaments. British opinion was strongly divided on the subject. Opposition to the proposal was based upon recognition that her chief weapon was her naval superiority, and that the chief effectiveness of the weapon was the power to

interfere with enemy trade. This was the familiar argument used by Pitt against recognizing "free flag, free goods." Commercial pressure was also urged as a means of shortening a war. On the other hand, a not-inconsiderable body of opinion in England favored immunity partly on moral grounds, partly on the plea that England's enormous commerce and her dependence on oversea connections for vital supplies made immunity desirable.

Although the proposal for immunity of private property was rejected, there was a very strong feeling that steps must be taken in the direction of a maritime code. The one convention that had any extended recognition was the Declaration of Paris, and it was of limited importance because not every great power had acceded to it, and because with no general agreement as to contraband and blockade, a great deal of it was made ineffective. To the great astonishment of the conference, Great

Britain proposed the entire abolition of contraband, and the limitation of visit to the ascertainment of the neutral character of a vessel. The suggestion of a strict definition of an auxiliary vessel weakened the concession somewhat, but Great Britain did not insist on making abolition contingent on this rule. No agreement was reached, suspicion of Great Britain's ulterior motives apparently contributing to the refusal of the proposal, which meant so profound a change in the rules of capture.

Great Britain and the United States stood together on the question of blockade, involving as it did the doctrine of continuous voyage, which continental powers refused to recognize. They also agreed in opposing the Russian proposal, which had the support of Germany, to allow the destruction of neutral prizes: a suggestion obviously in the interest of states not provided with abundance of overseas ports. The attempt to regulate the laying of mines

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on the high seas led to a long and violent discussion. One of the South American delegates made an impassioned appeal for the mitigation of one of the greatest horrors of war, "the hatred of man extended like a curse over the waves of the ocean." Such a concession would prove their sincerity in the cause of humanity. Great Britain backed the proposal strongly, making a strong plea for the rights of innocent navigation. The Russo-Japanese war had demonstrated the dangers from floating mines long after the period of hostilities was over. The Central Powers opposed any regulation, although Germany declared herself willing to agree that for a period of five years floating mines be forbidden; "in the expectation that, seven years hence, it will be easier to find a solution which will be acceptable to the whole world." This was the German idea in 1907! A melancholy interest attaches to the words of von Bieberstein: "Military acts are not gov-

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erned solely by principles of international law. The officers of the German navy, I emphatically affirm, will always fulfill, in strictest fashion, the duties which emanate from the unwritten law of humanity and civilization."

On the whole, the conventions adopted at the Hague with regard to belligerent right were far from representing much advance, though exception should be made of the prohibition of bombardment of undefended ports, the adaptation of the Geneva convention to maritime war, the provision that after an engagement "as far as military interests permit" the shipwrecked and injured must be cared for, and the exemption from capture of the captain and crew of an enemy merchant ship on their engagement not to take part in the hostilities. A convention on the rights and duties of neutrals was difficult to frame because of the conflicting interests of states; powers having well distributed ports standing for



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strict rules as to the use of neutral ports, while powers not so well provided claimed more generous provisions.

The great achievement of the conference so far as maritime affairs were concerned was the establishment of an international prize court, to put an end to the age-long dissatisfaction with national decisions by providing a court of appeal whose impartiality would be less open to question. The chief arguments against its establishment were that on many important points of international law there was no general agreement, and ratification of the convention establishing the court was withheld until a conference should agree on such a code. The declaration of London was the product of such a conference, and provides a magnificent example of what compromise can fail to accomplish.

The declaration settled one long-mooted point: the exemption from search of a convoyed fleet; but on many important points

qualifying concessions deprived the rule of effectiveness, as where the destruction of a prize was allowed when necessary for the safety of the warship or the success of its operations. The contraband arrangement satisfied nobody, for while the long controverted question of foodstuffs was settled by their being placed on the conditional list, the exempt list contained important articles for the manufacture of munitions, such as cotton, and belligerents were allowed to make additions by proclamation. The blockade agreement was also a compromise, rejecting the application of the doctrine of continuous voyage to anything but absolute contraband, but recognizing the British standard of effectiveness.

The British Parliament voted against the ratification of the Declaration of London, after a prolonged agitation. The arguments used against it were for the most part the same arguments that had been used against the abolition of the Navigation Acts

and the recognition that free flag makes free goods: that it would mean parting with the advantages given by British command of the seas. The agitation had a very special point because of the German ambition of becoming a strong military and naval power at the same time, and it was felt with justice that weakening British naval power strengthened Germany. When the war broke out in 1914 the presumption was that the belligerents would be governed by the principles agreed upon in 1856 in Paris and in 1907 at the Hague, and by the precedents of former wars. It is unnecessary to recall here the suggestion of the United States that the belligerents be governed by the Declaration, and the withdrawal of the suggestion when Great Britain's acceptance was conditional. Nor is it necessary to rehearse the events of two years when as the only powerful representative of neutral rights we divided our protests between Great Britain's disregard

of the rights of commerce and Germany's disregard of the rights of humanity. We began by reminding Germany that since 1785 we had co-operated with her in defending freedom of the seas. We gave attention to German explanations of what they meant by freedom of the seas, which ranged from the statement that they meant a balance of power that would make it impossible for any state to close the paths of the sea to commerce at the outbreak of a war, to the cynical confession that they meant the substitution of German dominance for British dominance. We listened in bewilderment as they explained how sea freedom was to be obtained by the independence of Ireland, the establishment of German cables and naval bases, the neutralization of the Suez Canal, the forbidding of transportation of troops by sea, as well as the abolition of the right of capture and the adoption of the Declaration of London, which was a "proclamation of freedom of

the seas." We looked on in horror as the German government proceeded to carry out its announcement that it intended to establish freedom of the seas by means of the submarine. When it became evident that it meant to persist in this course we joined the ranks of its enemies and co-operated with Great Britain in an extension of belligerent right for the cutting-off of enemy trade to an extent never dreamed of even in the days of Napoleon.

By these means the war has been brought to an end, and the world now faces the task of making a settlement which shall establish the freedom of the seas both in peace and in war. Freedom of the seas has been violated in each of the ways by which it has been violated in the past. The claim to monopolize portions of the sea has been revived by the sowing of mines and the proclamation of danger zones; neutral commerce has been interrupted to an extent unprecedented in any previous war; and

the sea lanes have been made unsafe for travel in a way that makes the days of piracy seem days of gentle usage.

To do away with the first and last of these evils, or at least to provide reasonable safeguards against them, may not be easy, but at least opinion the world over is fairly united on the subject. The regulation of belligerent right as to commerce, after a war won by unprecedented extension of that right, is a problem likely to tax the utmost ingenuity of the makers of the peace. We have seen how the movement for the restriction of that right had its origin in the business sense of a trading people that retained whenever possible the status of neutral, and how the movement gained strength in the period of eighteenth century idealism, when war was conceived as a contest of armed forces only, and it was felt that the trader ought to go his way undisturbed. The inclusion of the trader of the belligerent nation in this thought was

natural, and the whole movement gained ground in a period of rapidly expanding commerce and liberal ideas, until the immunity of private property at sea came to be regarded as the synonym for freedom of the seas.

The first check came when the chief champion of immunity experienced the advantages to a belligerent of the extension of belligerent right, the second with the realization that in the race for armaments limitation of belligerent right was a weakening of naval powers to the advantage of powers predominantly military. The race for armaments itself was a sign of the disappearance of the point of view of the eighteenth century individualist, and the war just ended has demonstrated how completely it has been buried under the idea of the nation in arms. If the war has proved anything it has proved that under modern conditions the old safeguards for the neutral are of no avail, and that in a

world war the rags and shreds of any maritime code with no better guarantee than the past has provided will flutter in the wind. If maritime codes are to be framed, as past codes have been framed, on the basis of acceptance of war as the expected state of affairs, instead of the exception; each nation will agree to concede only what it thinks it can yield without weakening itself as a belligerent, and the resulting compromise is not likely to be more satisfactory than the compromises of the past. When after centuries of struggle to make the law of war on the sea more in accordance with justice and humanity it is possible for the argument to be put forth that the revolting act of sinking the *Lusitania* came within the letter of the law, is it not time to tear up the poor fabric and rear a better law upon a better basis?





## **X**

# **THE LAW OF THE SEA TO-MORROW?**

**" This therefore is the mark at which he who is to care for the world must chiefly aim, that in this little plot of earth, belonging to mortal man, life may pass in freedom and with peace."**

***Dents.***



## X

### THE LAW OF THE SEA TO-MORROW?

**I**T is said of Edmund Burke that he once told Adam Smith: "You, Dr. Smith, from your Professor's chair, may send forth theories upon freedom of commerce as if you were lecturing upon pure mathematics; but legislators must proceed by slow degrees, impeded as they are by the friction of interest, and the friction of prejudice." When an American ex-professor several times in the past two years fell back into the habits of the lecture room and addressed an audience of legislators in terms quite reminiscent of Adam Smith, they listened without protest. In-

deed it seemed to many of them that these arm-chair theories might perhaps be somewhat useful across the sea in counteracting the effects of the teaching of several generations of German professors. But when suddenly events so framed themselves that it seemed possible that these doctrines might be put into practice throughout the world, there was something like a panic among the legislators. From across the seas came evidences of similar panic, and everywhere the practiced ear could detect the sinister sounds generated by the friction of interest and the friction of prejudice.

It was a true instinct that selected freedom of the seas as the most dangerous portion of President Wilson's utterances, for these pages have been written in vain if they have not made clear that freedom of the seas when used as a war cry is not a mere matter of belligerent right, but that it strikes at institutions with which interest and prejudice are closely bound up. When

it has been raised in the past there lay behind it either resentment at inequalities of opportunity in overseas markets or jealousy of the power that controlled the seas. The idea that he who controls the sea can sway the land is older than the phrase of Cicero, and as long as nations fight among themselves they will be avid of sea power. The nation that rules the waves to-day is the nation that ruled them in the days when France tried to wrest the trident from her. She claims, and with justice, that she has used her power to make and keep the seas free in time of peace. In time of war, she does not hesitate to state, the seas must be closed to her enemies. When, as in the war just ended, her enemies are the enemies of all freedom, criticism is dumb. But it will not remain dumb.

In the seventeenth century, it was of Cromwell that Frenchmen resentfully related that he had publicly declared no shot ought to be fired upon the seas without

England's permission. In the eighteenth century they were telling it of Pitt. The importance of the tale lay not in its authenticity but in its currency. Frenchmen relished what it implied just as they relished the claim of Englishmen to be champions—against Frenchmen—of the liberties of Europe. It is not difficult to find in current publications evidences that the France of to-day is not reconciled to the idea of permanent naval inferiority to England. Recent indications of the tenacity of Italian memory of the days when the Adriatic was a Venetian lake are not without significance. The dream of an American navy which will in perpetuity act in harmony with the British navy without evoking the jealousy of the rest of the world is a beautiful one—for an Anglo-Saxon. And a difference of opinion is even conceivable between men of Anglo-Saxon blood on different sides of the Atlantic over the point whether the British or the Ameri-

can navy ought to be the larger of the two.

The only possible solution for this as for so many of the problems raised by the war is international control of the seas through a league of nations. Sea law has always failed under stress, not alone because there was no general agreement as to what was the law, but because there was no generally recognized tribunal to administer it, and no generally recognized police to enforce it. The splendid spirit of the men who follow the sea; the fine traditions which have been so outraged by the barbarities of German sea practice: these are things too real and too valuable not to be used in the service of all humanity. Is it inconceivable that they should flourish in an international fleet, where there would be generous rivalry on the part of every man that the contingent furnished by his country should be second to none in spirit and in excellence? The experiment is surely worth trying, and there is no other alternative but future con-



tention for that so-called sea freedom which really means sea power.

International control of the seas would solve the problem of the narrow seas as well as the open sea. Neutralization, applied in the past to arms of the sea and existing on paper to-day in the case of some of the strategic waterways, has never been more than a stop-gap device. As long as war on land is recognized peace cannot arbitrarily be enforced on portions of the sea any more than upon the sea as a whole without producing inequalities that nations find intolerable.

In the league of nations, also, lies the hope of solution of the second aspect of the problem of freedom of the seas: that which has to do with those parts of the world where the labor is performed by yellow or brown or black men, and where white men covet the fruits of that labor. For because prejudice dies hard many men to-day still believe that it is in the line of their interest,

and the interest of the nation to which they belong, to fight making commerce free. We go about among our fellows without realizing how many of them are still living in the seventeenth century, and believing what the Germans believed when they started in 1914 to put their faith into practice: that the prosperity of one nation can be secured only at the expense of another.

Yet what is shown by our bird's-eye view of the struggle for the freedom of the seas? With very human instinct, the first explorers of the routes to the Indies sought to monopolize those routes, but other nations would not have it so, and each fought till it had gained a foothold, which each guarded for his own people as sedulously as had his predecessor. Yet the prosperity of these new possessions was not measured by the success with which the monopoly was guarded, and only those states retained their overseas possessions that learned by experience and let down trade barriers.

When we consider the care taken to preserve these monopolies: the complex laws and prohibitions and discriminating dues and duties; we cannot but marvel at the achievement of humanity in creating the wealth of the modern world after hampering itself in so many unnecessary ways. Only of late years have attempts been made to analyze the effects of these devices in particular cases, a task most difficult in the absence of reliable data and accurate statistics, but in the case of one device that was most highly prized, the navigation acts, it seems to have been fairly demonstrated that they hindered rather than helped the development they were devised to foster.

By the middle of the eighteenth century experience was bringing wisdom, and clear-sighted thinkers were preaching the gospel of the mutuality of trade. It was the good-fortune of the United States that her leading statesmen were men of vision, to

set her in the path of freedom which indeed was the path of interest for her. She had come into existence as a nation in protest against commercial restrictions; she had no colonies whose trade could be used to bargain with; and if she were to be admitted to the markets of other nations reciprocity was the logical basis for her to propose. She set her face against the policy of exclusive concessions and monopolies, and championed the equality of all nations in the markets of the world. She also championed the equality of foreigners with citizens in home markets, and made some progress in this direction along the line of abolition of discriminating dues. However, the adoption of a policy of protection definitely stopped one line of progress, and much education will be necessary to win the people of America to that form of freedom, whose advisability Great Britain has just triumphantly vindicated, and which

she shows signs of abandoning while the triumph is still fresh.

Long ago the old restrictive colonial system vanished. The Spanish empire fell to pieces. Although Great Britain's self-governing dependencies put up tariff walls, the doors of her colonies remained as wide open as her own. As the United States made her way into the markets of the Far East, she proclaimed her traditional policy of "equal and impartial trade" and reaffirmed it when by acquiring the Philippines she became a colonial power. Thanks to the navies of the maritime powers, and first among them to the navy of England, the seas to-day are free in time of peace, and ports and coaling stations are open without question to the ships of all the world. But with the development of modern industry, as colonies increased in importance as sources of raw materials, and profitable fields of investment, the old desire to guard them for the benefit of nationals grew

strong again. Mercantilism revived in new forms. Although the voice of the United States still spoke the old phrase of the open door, the hands could not always be distinguished from the hands of the concession hunters of Europe. The extension of our navigation laws, which meant our coasting trade monopoly, to our oversea possessions, gave rise to suggestions on the part of Englishmen that it might be desirable to re-enact the British navigation laws.

Thus the world, which had learned by slow and bitter experience the folly of trade restrictions and prohibitions, closed its eyes to the restrictionist policy as it came creeping back in an altered form. And it is to be feared that the commercial issues that were among the roots of this war, obscured as they were by Germany's lust for world dominion, have not been evident enough to convince the peoples of the world of the dangers that may accompany the great campaign for world trade that is again

under way. Raw materials play the part in the twentieth century that spices did in the sixteenth, and unless that international co-operation which proved so successful in winning the war is employed and extended to deal with their distribution, the wars for the control of raw materials will differ from the wars for control of the Indies only as submarine warfare differs from a battle between pinnaces and galleons. Prejudice and interest are strongly intrenched, yet they can be dislodged, if only the peoples would war with their intelligence against the foes of their own household with half as good a will as that with which they answer the call to war in the trenches.

If the world's peace is to prevail upon the world's highway, so that they who go down to the sea in ships may ply their business on the great waters in safety and tranquillity, there must be international machinery for enforcing the law of the sea, and an international tribunal to judge

transgressions of it. Not until that day comes can it be said with truth that the law is lord of the sea. And not until men of all nations meet in perfect equality in the markets of the four corners of the earth shall we know that the world has seen the end of wars for the freedom of the seas.





## **BIBLIOGRAPHICAL NOTES**



## BIBLIOGRAPHICAL NOTES

THE authorities which have been most useful in preparing this study are noted here, for the convenience of any reader who may wish to look further into the subject; a complete bibliography for a work covering so long a period would occupy a disproportionate amount of space.

For the treaties it is necessary to depend for the most part upon the old collections of Dumont,<sup>1</sup> Rymer,<sup>2</sup> Chalmers, and G. F. de Martens,<sup>3</sup> with their admitted defects. For the treaties relating to America we have the absolutely satisfactory texts edited, with illuminating comment, by Dr. Davenport,<sup>4</sup> but the volume covering the period to 1648 is the only one yet published. The treaties to which

<sup>1</sup> J. Dumont, *Corps universel diplomatique*, Amsterdam, 1726-31.

<sup>2</sup> T. Rymer, *Foedera*, London, 1727-1735; G. Chalmers, *Collection of treaties*, London, 1790.

<sup>3</sup> G. F. de Martens, *Recueil des principaux traités*, 2d ed., and continuations, Göttingen, 1817-1909.

<sup>4</sup> F. G. Davenport, *European treaties bearing on the history of the United States and its dependencies*. Carnegie Institution, Washington, 1917.

the United States was a party can be consulted in Malloy,<sup>5</sup> and those relating to Russia in the admirable series edited by F. Martens.<sup>6</sup> Hertslet<sup>7</sup> is convenient for the nineteenth century. The collections of Rousset<sup>8</sup> and Lamberty<sup>9</sup> are useful for documents and reprints of pamphlets not easily accessible elsewhere. Robinson's *Collectanea*<sup>10</sup> includes much documentary material, and French maritime legislation before the nineteenth century can be consulted more easily in Le Beau<sup>11</sup> than in the official *Bulletin*.<sup>12</sup>

Of the general works on international law the most useful for our purpose are those of Calvo,<sup>13</sup> Nys,<sup>14</sup> Westlake<sup>14</sup> and Wheaton.<sup>15</sup> For American cases the *Digest* and *International arbitration* of John Bas-

<sup>5</sup> W. M. Malloy, *Treaties*, 3 vols., Washington, 1910, 1913.

<sup>6</sup> F. Martens, *Recueil des traités conclus par la Russie*, St. Petersburg, 1874-1909.

<sup>7</sup> Sir E. Hertslet, *Map of Europe by treaty*, London, 1875-1891.

<sup>8</sup> Rousset de Missy, *Recueil historique*, Hague, 1728-1732.

<sup>9</sup> L. B. T. Lamberty, *Mémoires*, 14 vols., Amsterdam, 1740-1757.

<sup>10</sup> C. Robinson, *Collectanea maritima*, London, 1801.

<sup>11</sup> Le Beau, *Nouveau code des prises*, 3 vols. Paris, 1799-1801.

<sup>12</sup> The guide for the treaties is Tétot, *Répertoire des traités*, Paris, 1866, vol. 1.

<sup>13</sup> C. Calvo. *Le droit international*, 6 vols., Paris, 1896.

<sup>14</sup> E. Nys, *Droit international*, 2d ed., Brussels, 1912; *Études*, Brussels, 1896; *Origines*, Brussels, 1894. J. Westlake, *International law*, Cambridge, 1913.

<sup>15</sup> H. Wheaton, *Elements of international law*, 4th English ed., London, 1904; *History of the law of nations*, N. Y., 1845.

sett Moore are indispensable.<sup>16</sup> Useful handbooks are Westlake's *Chapters*<sup>17</sup> and Pitt Cobbett's *Cases and opinions*.<sup>18</sup> On the special subject of maritime law Nys,<sup>19</sup> Dupuis<sup>20</sup> and Twiss<sup>21</sup> have perhaps been most serviceable. For special aspects of maritime law mention must be made of Atherley Jones' *Commerce in war*<sup>22</sup> and Pyke's *Law of Contraband*.<sup>23</sup> In general, it may be said that the historical sections of even the most authoritative of the legal treatises must be used with caution, so tenacious have been some of the errors passed on from the books of one generation to those of another. Articles in the *American Journal of International Law* have corrected many errors of long standing on points of law.

In order to understand the development of the law of the sea it is necessary to become familiar with

<sup>16</sup> J. B. Moore, *Digest of international law*, Washington, 1906  
*International arbitration*, Washington, 1898.

<sup>17</sup> J. Westlake, *Chapters on the principles of international law*, Cambridge, 1894.

<sup>18</sup> Pitt Cobbett, *Cases and opinions on international law*, London, 1913.

<sup>19</sup> E. Nys, *La guerre maritime*, Brussels, 1881.

<sup>20</sup> Ch. Dupuis, *Loi de la guerre maritime après les doctrines anglaises*, Paris, 1899.

<sup>21</sup> Sir S. Twiss, *Belligerent rights on the high seas*, London, 1884.

<sup>22</sup> L. A. Atherley-Jones, *Commerce in war*, London, 1907.

<sup>23</sup> A. R. Pyke, *Law of contraband*, Oxford, 1915.

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the works that were influential at different periods. Grotius,<sup>24</sup> Bynkershoek,<sup>25</sup> and Vattel<sup>26</sup> are available in English translations. Mably<sup>27</sup> gives the key to much French thinking. The development of the continental school can be followed in Azuni,<sup>28</sup> Ortolan,<sup>29</sup> Hautefeuille;<sup>30</sup> Perels<sup>31</sup> gives the German standpoint.

For diplomatic relations before 1775 David Jayne Hill is a thoroughly satisfactory guide;<sup>32</sup> John Bassett Moore in his *American diplomacy*<sup>33</sup> touches briefly on all points important for America, and Debidour<sup>34</sup> covers European diplomatic history from the Congress of Vienna to the Franco-Prussian war.

<sup>24</sup> Grotius, *The freedom of the sea*, tr. by R. Magoffin, N. Y., 1916.

<sup>25</sup> Bynkershoek, *Law of war*, tr. by du Ponceau, Philadelphia, 1810.

<sup>26</sup> E. de Vattel, *Law of nations*, Northampton, Mass., 1805.

<sup>27</sup> L'Abbé Mably, *Le droit publique de l'Europe*, Geneva, 1776.

<sup>28</sup> D. A. Azuni, *Maritime law of Europe*, N. Y., 1806.

<sup>29</sup> T. Ortolan, *Règles internationales et diplomatie de la mer*, Paris, 1858.

<sup>30</sup> L. B. Hautefeuille, *Histoire des origines, du droit maritime*, 2d ed., Paris, 1869.

<sup>31</sup> F. Perels, *Manuel de droit maritime, international* (tr.), Paris, 1884.

<sup>32</sup> D. J. Hill, *A history of diplomacy in the international development of Europe*, N. Y., 1905-1914.

<sup>33</sup> J. B. Moore, *Principles of American diplomacy*, N. Y., 1918.

<sup>34</sup> A. Debidour, *Histoire diplomatique de l'Europe*, Paris, 1891-1908, 1916-1917.

No one has yet done for English commercial history what Levasseur<sup>35</sup> has done for that of France, but the compilations of Macpherson<sup>36</sup> and Anderson<sup>37</sup> are a mine of valuable material. The more important books on the subject of freedom of the seas have been mentioned in the text; a modern study of the highest value is that of Fulton,<sup>38</sup> but is definitely limited to the question of territorial waters. As far as possible contemporary pamphlets and letters have been used for the estimating of public opinion at different periods. The great source for the opinions of the governing class in England has been Hansard;<sup>39</sup> even during the period of Dr. Johnson's reportorial activities the spirit of the debates if not the actual words survive.

For chapters one and two, the chief sources are Dr. Davenport's volume of treaties and the studies of early English prize law by Marsden.<sup>40</sup> The exploits of the French mariners are fascinatingly told

<sup>35</sup> E. Levasseur, *Histoire du commerce de la France*, Paris, 1912.

<sup>36</sup> D. Macpherson, *Annals of commerce*, London, 1805.

<sup>37</sup> A. Anderson, *Origin of commerce*, Dublin, 1790.

<sup>38</sup> T. W. Fulton, *The sovereignty of the sea*, Edinburgh and London, 1911.

<sup>39</sup> T. Hansard, *Parliamentary debates*.

<sup>40</sup> R. G. Marsden, *Law and custom of the sea*, Navy Records Society, London, 1915-16; *High Court of Admiralty*, Roy. hist. soc., tr., n. s., v. 16; *Select pleas in the Court of Admiralty*, Selden Soc., London, 1894-1897.



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by Guénin<sup>41</sup> and by La Roncière.<sup>42</sup> An interesting contrast in treatment resulting from differing points of view may be enjoyed by comparing Corbett's account of the Elizabethan seamen<sup>43</sup> with that of Professor Cheyney.<sup>44</sup> The Dutch and English rivalry is well told by Edmundson.<sup>45</sup> The French collection of the Carleton papers gives much not published in the English collection.<sup>46</sup> Mims' monograph sheds a flood of light upon the policy of Colbert.<sup>47</sup> Professor Abbott's recently published work contains much that is pertinent and gives further bibliographical suggestions for this period.<sup>48</sup>

The story of the Ostend Company is told fully from the Belgium point of view by Huisman, who utilized extensive Continental sources.<sup>49</sup> . . . G. B. Hertz tells the story from the English sources in the Eng-

<sup>41</sup> E. Guénin, *Ango. et ses pilotes*, Paris, 1901.

<sup>42</sup> C. G. de la Roncière, *Histoire de la marine française*, Paris, 1899-1907.

<sup>43</sup> J. S. Corbett, *Drake and the Tudor Navy*, London, 1898.

<sup>44</sup> E. P. Cheyney, *A history of England, from the defeat of the Armada*, N. Y., 1914.

<sup>45</sup> George Edmundson, *Anglo-Dutch rivalry*, Oxford, 1911.

<sup>46</sup> Sir Dudley Carleton, *Lettres, memoires, et négociations*, Hague, 1759.

<sup>47</sup> S. L. Mims, *Colbert's West India policy*, New Haven, 1912.

<sup>48</sup> W. C. Abbott, *The expansion of Europe*, N. Y., 1918.

<sup>49</sup> M. Huisman, *La Belgique commerciale*, Brussels, 1902.

lish Historical Review.<sup>50</sup> Both cite, and quote freely, contemporary pamphlets. Accarias de Serione<sup>51</sup> and Bertrand de Ulloa<sup>52</sup> give contemporary views of commerce which may well be compared with the modern study by Professor Haring.<sup>53</sup> The war of Jenkins' ear has been fully treated by Temperley.<sup>54</sup> Invaluable contemporary material appears in the *London Magazine* and *Gentleman's Magazine*. Coxe's Life of Walpole<sup>55</sup> contains many illuminating letters, and Yorke's life of the Earl of Hardwicke much interesting detail.<sup>56</sup> For the diplomatic complications of the period Baudrillart's *Philippe*<sup>57</sup> is useful, and Satow's careful study gives the details of Frederick the Great's controversy over maritime

<sup>50</sup> *English Historical Review*, vol. 22, 255-270.

<sup>51</sup> Accarias de Serione, *Les interets des nations de l'Europe*, Leipsic, 1766.

<sup>52</sup> Bernardo de Ulloa, *Rétablissement des manufactures et du commerce d'Espagne*, tr., Amsterdam, 1733.

<sup>53</sup> C. H. Haring, *Trade and navigation between Spain and the Indies*, Cambridge (Mass.), 1918.

<sup>54</sup> *Transactions of the Royal Historical Society*, 1909, pp. 197-236.

<sup>55</sup> William Coxe, *Memoirs of the life and administration of Sir Robert Walpole*, London, 1798.

<sup>56</sup> P. Yorke, *Life and correspondence of Philip Yorke, earl of Hardwicke*, Cambridge, 1913.

<sup>57</sup> C. Baudrillart, *Philippe V et la cour de France*, Paris, 1890-1901.

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rights.<sup>53</sup> The Bernstorff<sup>54</sup> and Bedford<sup>55</sup> correspondence give the two sides of the controversy as to neutral right midway in the century.

For chapter four, the American State Papers<sup>56</sup> and Wharton's collection of letters<sup>57</sup> must be supplemented by the documents in Doniol<sup>58</sup> and in Circourt's edition of Bancroft.<sup>59</sup> Fauchille's study of the armed neutrality of 1780 is based on documents in the French archives.<sup>60</sup> The anti-English bias of his work may be corrected by reference to Piggott's articles, written in a spirit equally partisan.<sup>61</sup> The Malmesbury letters are indispensable.<sup>62</sup>

<sup>53</sup> Sir E. Satow, *The Silesian loan and Frederick the Great*, Oxford, 1915.

<sup>54</sup> *Correspondence entre comte Bernstorff et le duc de Choiseul*. Copenhagen, 1791.

<sup>55</sup> *Correspondence of John, fourth Duke of Bedford*, London, 1846.

<sup>56</sup> *American State Papers, Foreign*, Washington, 1832.

<sup>57</sup> *Revolutionary diplomatic correspondence*, edited by Francis Wharton, Washington, 1889.

<sup>58</sup> H. Doniol, *Histoire de la participation de la France à l'établissement des Etats-Unis d'Amerique*, Paris, 1890.

<sup>59</sup> A. de Circourt, in vol. 3 of Bancroft, *Histoire de l'action commune de la France et de l'Amerique*, Paris, 1876.

<sup>60</sup> Paul Fauchille, *La diplomatie française et la ligue des neutres de 1780*, Paris, 1893.

<sup>61</sup> *In Nineteenth Century Review*, 1917, vol. 81, pp. 819-845; vol. 82, pp. 140-163.

<sup>62</sup> *Diaries and letters of James Harris, first earl of Malmesbury*, London, 1844.

The question of the beginning of American tariff policy is still in the controversial stage. William Hill brings together the opinions of early American statesmen,<sup>68</sup> and Professor Taussig is an authoritative guide for further material.<sup>69</sup> The debates in the House of Representatives must be read in the *Annals of Congress*;<sup>70</sup> for the Senate debates we must depend on the caustic comment of Maclay.<sup>71</sup> The admirable work on American commerce, directed by E. R. Johnson, is indispensable for the main features of American commercial policy.<sup>72</sup> Numerous studies have been made of the treaty of 1786, of which Dumas' work deserves especial mention; J. Holland Rose has republished with some changes in his work on Pitt the paper which first appeared in the *English Historical Review*.<sup>73</sup> The Auckland correspondence<sup>74</sup> sheds light on the English side of the negotiations; for the French side see the bibliographical notes in

<sup>68</sup> W. Hill, *First stages of American tariff policy*, Publications of American Economic Association, vol. 8, 1893, 453 ff.

<sup>69</sup> F. W. Taussig, *Tariff history of the United States*, 6th ed. N. Y. 1914.

<sup>70</sup> *Debates and Proceedings in the Congress of the United States, 1789-1791*, Washington, 1834.

<sup>71</sup> W. Maclay, *Sketches of debate*, Harrisburg, 1880.

<sup>72</sup> E. R. Johnson, et al *History of the commerce of the United States*, Carnegie Institute, Washington, 1915.

<sup>73</sup> J. Holland Rose, *William Pitt*, London, 1911.

<sup>74</sup> *Correspondence of William Eden, Lord Auckland*, London, 1861-1862.

*Levasseur*. French revolutionary procedure must be traced in the *Moniteur* and in the *Archives parlementaires*.<sup>76</sup> Numerous contemporary reprints of speeches are available to correct the latter work. The *Procès verbaux*<sup>76</sup> of the committee on agriculture and commerce; the *Actes* of the committee of public safety<sup>77</sup> and the *Journal des débats* are indispensable.

The studies of J. Holland Rose provide a background for the commercial aspects of the Napoleonic wars. The careful account by Professor Lingelbach is invaluable.<sup>78</sup> The correspondence of the French representatives in America is indispensable for French policy,<sup>79</sup> and the correspondence of John Quincy Adams is most illuminating for Anglo-American relations.<sup>80</sup> All students of the opening period of the nineteenth century must express their heavy obligation to Henry Adams.<sup>81</sup> Mr. W. A. Phillips has outlined acceptably the attempts to confederate

<sup>76</sup> Mavidal and Laurent, *Archives parlementaires*, Paris, 1867.

<sup>76</sup> *Procès verbaux du comité de l'agriculture et du commerce*, Paris, 1906.

<sup>77</sup> *Actes du comité du salut publique*, Paris, 1839.

<sup>78</sup> W. E. Lingelbach, England and neutral trade, in *Military historian and economist*, April, 1917, vol. 2, pp. 153-178.

<sup>79</sup> In American Historical Association, *Annual Report*, 1903, vol. 2.

<sup>80</sup> John Quincy Adams, *Writings*, edited by W. C. Ford, 1914.

<sup>81</sup> Henry Adams, *The United States, N. Y., 1889-1891; The writings of Albert Gallatin*, Philadelphia, 1879.

Europe.<sup>83</sup> Dr. Dubois is a reliable guide for the literature of American relations to the slave trade, and Mr. Lane-Poole's readable account of it is not unduly British in tendency.<sup>84</sup> Dr. Robertson is an authoritative guide for Spanish-American relations.<sup>85</sup>

The fluctuations of public opinion on commercial and maritime matters can best be studied in Hansard, the analyses of which by William Smart are exceedingly valuable for the brief period which they cover.<sup>86</sup> Morley's *Cobden*,<sup>87</sup> and Trevelyan's *Bright*<sup>87</sup> are the standard guides to the free trade movement. The questions of maritime law brought forward by the Declarations of Paris and London are illuminated by a mass of periodical comment especially in the English reviews and the *Revue des deux mondes*. An interesting example of hopefulness for freedom of the seas, based on premises no longer tenable, is provided by F. R. Stark.<sup>88</sup> For The Hague conferences the documents are available

<sup>83</sup> W. A. Phillips, *The Confederation of Europe*, London, 1914.

<sup>84</sup> Stanley Lane-Poole, *The Story of the Barbary Corsairs*, N. Y., 1896.

<sup>85</sup> W. S. Robertson, *Rise of the Spanish American republics*, N. Y., 1918.

<sup>86</sup> William Smart, *Economic annals of the nineteenth century*, (1801-1890), London, 1910, 1917.

<sup>87</sup> John Morley, *Life of Richard Cobden*, London, 1896.

<sup>87</sup> G. W. Trevelyan, *Life of John Bright*, London, 1913.

<sup>88</sup> F. R. Stark, *The abolition of privateering and the declaration of Paris*, N. Y., 1897.

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in embarrassing profusion; of the secondary works those of A. Pearce Higgins<sup>89</sup> and James Brown Scott<sup>90</sup> are most useful.

For the question of maritime law raised by the great war the diplomatic correspondence of the United States with belligerent powers during the first two years is fundamental; the large number of works published since August, 1914, are inevitably partisan in tone or tendency. For them the periodical indices furnish the most satisfactory guide.

<sup>89</sup> A. P. Higgins, *The two Hague conferences*, Cambridge, 1909.

<sup>90</sup> James Brown Scott, *The Hague peace conferences*, Baltimore, 1909.

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